(20.980.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 577.

ST. LOUIS, KANSAS CITY AND COLORADO RAILROAD COMPANY, APPELLANT,

vs.

THE CITY OF ST. LOUIS AND WABASH RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED JANUARY 17, 1908.

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a In the Circuit Court of the United States for the Eastern District of Missouri, Eight- Judicial Circuit.

In Equity. Nos. 2357 and 2464. Consolidated Cause.

CENTRAL TRUST COMPANY OF NEW YORK ET AL., Complainants,

vs.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendants.

In the Matter of the Intervening Petition of The City of St. Louis and The St. Louis, Kansas City and Colorado Railroad Company.

Filed herein July 12, 1886.

Application and Motion of the St. Louis, Kansas City and Colorado Railroad Company.

UNITED STATES OF AMERICA, *sct:*

To the City of St. Louis and Wabash Railroad Company, Greeting:

You are cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, thirty days from and after the day this citation bears date, pursuant to an appeal allowed from a decree entered upon December 20, 1907, by the Circuit Court of the United States for the Eastern District of Missouri, in above entitled cause, upon said motion and application, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John H. Rogers, Judge of the
b Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, this twentieth day of December, 1907.

JOHN H. ROGERS,

U. S. District Judge for the West'n Div. of Arkansas, Assigned to and Sitting in the Circuit Court of the United States for the East'n Div. of the East'n Dist. of Missouri.

UNITED STATES OF AMERICA,
Eastern District of Missouri, sct:

Due service of the within Citation is acknowledged this 20" day of December, 1907.

CHAS. W. BATES,
Solicitor for the City of St. Louis, Missouri.
WELLS H. BLODGETT &
J. L. MINNIS,
Solicitor- for Wabash Railroad Company.

bb [Endorsed:] Nos. 2357 and 2464. Consolidated Cause. Central Trust Company of New York, *et al.*, Complainants, *vs.* Wabash, St. Louis and Pacific Railway Company, *et al.*, Defendants. Citation for Supreme Court. Filed Dec. 20, 1907. James R. Gray, Clerk.

c UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

In the Circut Court of the United States in and for the Division and District aforesaid.

Be it remembered: That heretofore, to-wit: on the 6th day of June, 1905, in a certain cause pending in said Court wherein The Central Trust Company of New York *et al.* are complainants, and the Wabash, St. Louis & Pacific Railway Company, *et al.* are defendants, and the City of St. Louis and the St. Louis, Kansas City & Colorado Railroad Company are intervenors, and upon the final hearing in said cause upon the motion and application of the said St. Louis, Kansas City and Colorado Railroad Company for a construction of the decree of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri of December 31st, 1886, herein, there were filed a certain volume of pleadings and proofs entitled "Pleadings and Evidence" and two plats as exhibits thereto, entitled "Chart A" and "Exhibit D" which said "pleadings and evidence," "Chart A" and Exhibit D" are respectively in words and figures as follows, to-wit:

(*Pleadings and Evidence.*)

1 In the Circuit Court of the United States for the Eastern District of Missouri, Eighth Judicial Circuit.

Central Trust Company of New York et al., Complainants,
Nos. 2357 and 2464. vs. In Equity.
Wabash, St. Louis & Pacific Railway Company et al., Defendants.
Consolidated Cause. March Term, 1902.

In the Matter of the Intervening Petition of the City of St. Louis and the St. Louis Kansas City and Colorado Railroad Company, Filed Herein July 12th, 1886.

Application and Motion of the St. Louis, Kansas City & Colorado Railroad Company.

To the Honorable Judges of the Circuit Court of the United States, for the Eastern District of Missouri, Eastern Division:

Now comes the St. Louis, Kansas City & Colorado Railroad Company, and respectfully represents and shows:

2 1. It is and has been since prior to July 22d, 1886, a corporation organized and existing under the laws of the State of Kansas for the purpose of carrying on the business of a railroad, and has since said time carried on its business in the State of Missouri, owning and operating a line of railway extending from the town of Union, in Franklin County, to a point in the City of St. Louis, Missouri, in Union Avenue, where the same intersects with the north line of Forest Park in said city.

2. On July 12th, 1886, the Wabash, St. Louis & Pacific Railway Company owned and operated a line of railway in the State of Missouri, including the portion of railroad mentioned in the decree hereinafter set forth, and it was at that time in the hands of the receivers appointed in this cause.

3. During the pendency of this cause and while the property mentioned in the decree hereinafter set forth was so being operated by said receivers and on July 12th, 1886, there was filed in this cause a bill of intervention by the City of St. Louis and said St. Louis, Kansas City & Colorado Railroad Company. The purpose of such intervention was to obtain for said St. Louis, Kansas City & Colorado Railroad Company the right to the use of the railroad property mentioned in said decree. Thereafter said intervention came on for hearing and upon December 31st, 1886, this court in this cause entered a decree thereon, which decree is in words and figures as follows, to-wit:

3 In the Circuit Court of the United States, for the Eastern District of Missouri.

September Term, A. D. 1886.

Central Trust Company of New York et al., Complainants,
Nos. 2357 and 2464. vs. In Equity.
Wabash, St. Louis & Pacific Railway Company et al., Defendants.

Consolidated Cause.

The City of St. Louis, and St. Louis, Kansas City and Colorado Railroad Company, Intervenors.

Final Decree.

December 31st, 1886.

This day came the City of St. Louis, Missouri, and the St. Louis, Kansas City and Colorado Railroad Company, intervenors herein, by their solicitors, John W. Noble and John C. Orrick, Leverett Bell and John F. Ellis, and the defendants against said intervention, the Central Trust Company of New York, and James Cheney (complainants in said consolidated cause), the Wabash, St. Louis and Pacific Railway Company, defendants in said cause, Solon Humphreys and Thomas E. Tutt, receivers of said latter company, by their solicitors, Wager Swayne, Wells H. Blodgett, H. S. Priest and Warwick Hough, and thereupon the cause on said intervention came on to be heard upon the reports (both that on preliminary and that on final hearing), George H. Shields, Esq., Special Master, pro hac vice, herein only appointed by this court, and to whom this cause, under previous orders herein, was re-
4 ferred to ascertain and report the facts as well as his conclusions of the law; and also on the amended bill, answer and replication, exhibits, documents and evidence adduced; said reports bearing date July 24th and October 4th, 1886, respectively, and also upon exceptions taken to said reports on the part of the said defendants, the Wabash, St. Louis & Pacific Railway Company, Solon Humphreys and Thomas E. Tutt, receivers thereof, and the Central Trust Company of New York and James Cheney as trustees, and it appearing that the said exceptions by consent of parties, are taken as duly filed in this court, as well as before the said master, and the said exceptions and said cause having been argued by counsel and due deliberation had thereon, the court now orders, adjudges and decrees, that each of said exceptions of said defendants be disallowed and overruled, save and except that part of the eleventh exception which relates to the basis of compensation for use of right of way, and that said part of said eleventh exception be and is hereby sustained; and the said

reports, save and except as aforesaid, are in all things hereby confirmed; and the court will determine the compensation and the basis therefor, without further reference to the master.

And the court doth further find, order, adjudge and decree, that the equities are with said intervenors, and said intervenors are entitled to the relief as prayed for in their amended bill of complaint herein.

And the Court finds, adjudges and decrees that the basis of compensation to be paid by the intervenor, the St. Louis, Kansas City & Colorado Railroad Company, for the use of the right of way and the tracks ,side-tracks, switches, turn-outs, turn-tables, and other terminal facilities of said Wabash, St. Louis & Pacific Railway Company at and between the north line of Forest Park and Eighteenth street in the city of St. Louis,
5 shall be the value of said right of way, tracks and other property last described, as determined by the master in his said reports; and the compensation to be paid shall be, per annum, six per cent, on one-half of the value of said right of way, tracks, side-tracks, switches, turn-outs, turn-tables, and other terminal facilities of said Wabash, St. Louis & Pacific Railway Company at and between the north line of Forest Park and Eighteenth street in the city of St. Louis, shall be the value of said right of way, tracks, and other property last described, as determined by the master in his said reports; and the compensation to be paid shall be, per annum, six per cent on one-half of the value of said right-of-way, tracks, side-tracks, switches, turnouts, turntables, and other terminal facilities, and the said one-half value is and shall be taken to be $500,000; and that the intervenor, the St. Louis, Kansas City & Colorado Railroad Company, its successors or assigns, pay to said receivers, Solon Humphreys and Thomas E. Tutt, or their successors in interest, the sum of thirty thousand dollars per annum, in monthly installments of twenty-five hundred dollars each on the 15th day of each month, so long as this decree remains in force, the first monthly installment to become due and payable thirty days after said railroad company, intervenor, shall have connected its tracks with that of the Wabash, St. Louis & Pacific Railway Company at the north line of said Forest Park. All subsequent payments to be made from month to month during the lifetime of this decree.

And the court doth further find, adjudge and decree that the expense per annum of maintaining the said right of way and other property pending such joint use thereof, including therein all taxes upon said property, shall be borne by said
Wabash, St. Louis & Pacific Railway Company and the
6 said intervenor, the St. Louis, Kansas City & Colorado Railroad Company, in proportion to the number of

wheels each of said companies shall cause to be passed over the main track or parts thereof on said right of way per annum bears to the total number of wheels that both of said companies shall cause to be passed over the same during each year pending the said period of such joint use, and that this expense shall be paid at the expiration of each year. The said right of way and tracks thereon and other terminal facilities shall be maintained and kept in good repair by the Wabash, St. Louis & Pacific Railway Company.

And the court doth further order, adjudge and decree that the running of all trains, engines or cars of said intervenor, the said St. Louis, Kansas City & Colorado Railroad Company, over said right of way and tracks, and the use of said right of way, road, terminal facilities and other property specified as aforesaid, shall conform to the rules and regulations now in force, and such other reasonable rules and regulations as may hereafter be adopted by the said Wabash, St. Louis & Pacific Railway Company, or its said receivers, to enable said intervenor to fully enjoy the benefits of this decree, and that the trains of said railroad company, intervenor, shall be so regulated as that at least eight minutes shall, if deemed necessary, intervene between its trains and the trains of said Wabash, St. Louis & Pacific Railway Company at any point between said north line of Forest Park and Eighteenth street, and that the sole control and regulation of the running of the trains of the said companies shall be under the decree in the Wabash, St. Louis & Pacific Railway Company and its receivers, and subject to the further order of this court.

And the court doth further order, adjudge and decree that in all respects, subject to the terms of this decree, the
7 said railroad company, intervenor, shall enjoy the equal use and benefit of said right of way, tracks, switches, side tracks, turnouts, turn-tables and other terminal facilities with said Wabash, St. Louis & Pacific Railway Company, or its said receivers, and the said Wabash, St. Louis & Pacific Railway Company, and Solon Humphreys and Thomas E. Tutt, as such receivers, and said Central Trust Company of New York, and James Cheney, and all persons claiming by, through or under them, and each of them respectively, and their agents, servants, counselors and employes, be, and the same are hereby perpetually enjoined and restrained from in any manner refusing to permit the said intervenor, the said St. Louis, Kansas City and Colorado Railroad Company, its successors or assigns, and its or their officers, agents, employes, from using with it or their engines, cars (loaded or empty), the said right of way, tracks, switches, side tracks, turnouts, turntables and other terminal facilities of said Wabash, St. Louis & Pacific

Railway Company between the north line of said Forest Park and said Eighteenth street on the terms hereinabove set forth in this decree in and for the transacting of its or their business and in the operation of its or their road.

And the said intervenor, the St. Louis, Kansas City & Colorado Railroad Company, by its officers, agents and employes and each of them is hereby authorized and permitted with its right of way, road tracks and property, engines and cars, loaded or empty, to make connection with said Wabash, St. Louis & Pacific Railway Company at the north line of said Forest Park, and to use the said right of way, tracks, switches, side tracks, turnouts, turntables, and other terminal facilities of said Wabash, St. Louis & Pacific Railway Company, or any one claiming by, through or under it as to the same, between the north line of said park and Eighteenth street
8 on the terms, in the manner and subject to the regulations in this decree set forth, in and for the transaction of the business and in operation of the road of said St. Louis, Kansas City and Colorado Railroad Company, its successors or assigns, and said Solon Humphreys and Thomas E. Tutt, receivers, and all agents, servants or persons by them engaged or acting with or for them; said Central Trust Company and James Cheney; said Wabash, St. Louis & Pacific Railway Company; and all persons claiming by, through or under said last named company, are hereby restrained and enjoined from in anywise obstructing, preventing, interfering with or refusing to comply with the permit and privilege hereby ordered, adjudged and decreed.

And said receivers shall by all means in their power aid to fully carry this decree and every part thereof into effect.

And it is further ordered, adjudged and decreed that the intervenors have and recover of the respondents answering herein, their costs and expenses in this proceeding, including the master's compensation, to be herein taxed, and that the receivers, Solon Humphreys and Thomas E. Tutt, are authorized and directed to pay the same out of any funds now in their hands.

(Signed) DAVID J. BREWER,
Circuit Judge.

4. Said decree was affirmed by the Supreme Court of the United States on January 19th, 1891, and the mandate of that court was duly issued and filed herein directing this court to carry out and enforce said decree, and the same is now in full force and effect and has not in any manner been changed or modified.

5. At the time said bill of intervention was filed on July 12th, 1886, the said property of said Wabash, St. Louis
9 & Pacific Railway Company was in the possession of Solon Humphreys and Thomas E. Tutt, receivers as aforesaid, and included the line of railway, right of way, tracks, side tracks switches, turnouts, turntables, and other terminal facilities of said Wabash, St. Louis & Pacific Railway Company at and between the north line of Forest Park in St. Louis where the same is intersected by Union avenue and Eighteenth street in said city.

6. Subsequently in this cause a decree of foreclosure and sale was made and said property sold, but under the terms of the decree jurisdiction was retained over the said property, and the property duly conveyed to and vested in the Wabash Western Railroad Company, which was duly incorporated under the laws of the State of Missouri, and which, pursuant to the orders of this court in this cause, entered its appearance herein and has continued so to do from that time on until some time during the year 1893, and since said time said Wabash Western Railroad Company has continued to be and still is a party defendant to this cause.

On or about July 29th, 1889, the said Wabash Western Railroad Company under and pursuant to the statutes of Missouri, consolidated with the Wabash Railway Company, another corporation, into the Wabash Railroad Company, which latter company has continuously since said date been the owner of and in possession and control of said property and continuously since said date has operated the same. It has claimed and now claims to own and operate said property as the successor in interest of the said Wabash, St. Louis & Pacific Railway Company, and the said Solon Humphreys and Thomas E. Tutt, receivers, as aforesaid.

Ever since the said decree upon said bill of intervention became final by affirmance in the Supreme Court of the United States and up to and including the 7th day of May, 1902,
10 the said Wabash, St. Louis & Pacific Railway Company, the said receivers, the said Wabash Western Railway Company and said Wabash Railroad Company have fully recognized the validity of said decree hereinbefore set forth, and the binding force of the duties and obligations imposed upon them therein, and upon said railroad companies as successors in interest of said Wabash, St. Louis & Pacific Railway Company and said receivers, and have recognized the rights thereunder of your petitioner as they are herein claimed and set forth.

7. The line of railway operated by your petitioner crosses the line of said Wabash Railroad Company at Forsythe Junction, in the city of St. Louis, and terminates at the intersection of Union Avenue with the north line of Forest Park in said city, and your petitioner in the operation of its line of railway has no railway connection with or access to any other railway in the said city other than over that portion of the line of railway of the Wabash Railroad Company referred to in said decree. Your petitioner has continuously recognized the validity of said decree and up to the 7th day of May, 1902, enjoyed the equal use and benefit of the right of way, tracks, switches, side tracks, turnouts, turntables and other terminal facilities of said Wabash Western Railroad Company and said Wabash Railroad Company at and between the north line of Forest Park and Eighteenth street in said city of St. Louis, conferred upon and vested in it by said decree, and, as required thereby, your petitioner has, ever since the decree was entered and up to the present time, paid to said Wabash Western Railroad Company and said Wabash Railroad Company the sum of thirty thousand dollars per annum, in monthly installments of twenty-five hundred dollars each, on the 15th day of each month, and has also paid its proportion of the expenses per annum of
11 maintaining the said right of way and tracks, side tracks, switches, turnouts, turntables, and other terminal facilities, including therein all taxes upon said property, in the proportion of the number of wheels your petitioner has caused to be passed over the main track or parts thereof on said right of way per annum has borne to the total number of wheels that both said Wabash Western Railroad Company and said Wabash Railroad Company and their predecessors, and your petitioner have caused to be passed over the same from the date of said decree until this time.

8. The railway line of said Wabash Western Railroad Company and said Wabash Railroad Company, being the same property fully described in said decree as the property of said Wabash, St. Louis & Pacific Railway Company, connects at or near Eighteenth street in said city of St. Louis with the tracks of the Terminal Railroad Association of St. Louis, which said last named company has connection with all railroad companies entering the city of St. Louis and the city of East St. Louis. All freight traffic destined to or from points upon the line of railway of your petitioner and passing over other lines of railway entering said city of St. Louis, must pass over the portion of line of railway mentioned in said decree between Eighteenth Street and the intersection of Union avenue with the north line of Forest Park. Along said right of way are tracks, side tracks,

switches, turnouts, turntables and other terminal facilities, which have, ever since the date of said decree, been maintained and operated at the joint expense of said Wabash Western Railroad Company and said Wabash Railroad Company and your petitioner in the proportion of the use of the same by each of said parties, the same being used for the purpose of receiving and delivering freight to and from industries located along said right of way, and for the purpose of placing cars and
12 trains thereon to enable through trains to pass over the main tracks, and for the placing of cars on said tracks for receiving and delivering freight, and for making switchings in the receiving and delivering of cars loaded and empty; and your petitioner has no terminal facilities for the transaction of its business in the city of St. Louis other than those afforded and secured by said decree.

9. Your petitioner not only paid upon the wheelage basis as provided in said decree, its proportion of the expenses per annum of maintaining said right of way, tracks, side tracks, switches, turnouts, turntables and other terminal facilities, including all taxes upon the same, but it likewise paid its proportion of the expense of constructing new tracks, new side tracks, new switches, new turnouts, and all other betterments placed upon the property since the entry of said decree.

Upon the hearing of said bill of intervention the representatives of the owners of said property mentioned in said decree insisted that the compensation to be paid by your petitioner should be based upon the entire value of said right of way, main tracks, side tracks, switches, turnouts, and turntables and the use of all other terminals facilites, including the right to reach any industry then existing or might thereafter be established along said line, including also the right to receive and discharge freight and load and unload cars on side tracks and to transact any business on said right of way and property which might be transacted by the owner of the property, and in accordance with the said contention the court fixed the compensation at a much larger and higher sum than it found would have been the value based upon the mere right to use the two main tracks and right of way upon which the same were situated.

10. On or about May 7th, 1902, the representatives of
13 the Wabash Western Railroad Company and Wabash Railroad Company for the first time claimed that the construction of the decree hereinbefore set forth was that your petitioner had no right thereunder except to use the main track upon the said right of way for passing trains, and the side tracks and passing tracks for the sole purpose of permitting

trains to pass each other, and that your petitioner had no right to use for any other purpose any of the side tracks, switches or turnouts and had no right to the use of the other terminal facilities of said Wabash Western Railroad Company and Wabash Railroad Company, or any right to reach any of the industries along the line thereof, or to load or unload cars, or to receive or deliver freight on any of said side tracks, or on the right of way of said railway companies between Union avenue and Eighteenth street aforesaid, and ever since May 7th, 1902, the Wabash Western Railroad Company and Wabash Railroad Company have acted upon that construction of the decree and declined and refused, and still decline and refuse, to permit your petitioner to use any of the property mentioned in said decree except for the purpose of passing trains over the main tracks and the use of the side tracks to permit trains to pass each other, and refused, and still refuse, to permit your petitioner to operate engines or cars into or upon any of the switches or to reach any of the said industries located along the said railroad for the purpose of receiving or discharging freight, and for the purpose of preventing your petitioner from having use of said right of way, tracks, switches, side tracks, turnouts, turntables and other terminal facilities as provided by said decree, have placed engines and cars in front of and behind cars and trains of your petitioner and thrown switches and prohibited those in charge of said switches from moving the same,

14 and have prevented and still prevent your petitioner from entering upon said property although the transaction of petitioner's business has since May 7th, 1902, made it necessary for it to enter the same.

In order to handle the freight traffic for said industries located along and upon said right of way there are switches and side tracks which petitioner and said Wabash Western Railroad Company and Wabash Railroad Company have jointly constructed, used and maintained according to the provisions set forth in said decree, all of which your petitioner has, as aforesaid, since May 6th, 1902, been prevented from using, and your petitioner has also been so prevented by the companies aforesaid from receiving or delivering freight upon said right of way. Your petitioner has now continuing contracts for the transportation of freight to and from said industries upon said right of way, main track, side tracks and switches covered by the said decree, which said companies have prevented it from carrying out, and the denial of such right as hereinbefore set forth made and persisted in by said companies is a violation of the terms and provisions of said decree, which specifically enjoins all persons claiming by, through or under the Wabash, St. Louis & Pacific Railway Company from in anywise obstructing, preventing, interfering

with or refusing to comply with the permission and privilege therein ordered, adjudged and decreed to the St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns.

Wherefore, your petitioner moves the court for an order requiring the Wabash Western Railroad Company and Wabash Railroad Company and each of them, their officers, agents and employes to perform and comply with the terms of the said decree, to permit your petitioner to have the use of the right of way, tracks, side tracks, switches, turnouts, turntables and other terminal facilities as set forth in said decree and
15 to make such orders in the premises as will accomplish the purpose and for such other and further relief as may be just and equitable.

JOHN H. OVERALL,
FRANK HAGERMAN,
M. A. LOW,
W. F. EVANS.
Solicitors for the St. Louis, Kansas City & Colorado Railroad Company.

United States of America,
Eastern District of Missouri,
Eastern Division—ss.

I, Geo. L. Sands, upon oath say that I am the Vice-Prest. and Gen'l Mgr. of the St. Louis, Kansas City & Colorado Railroad Company, the petitioner above named, that I have read the foregoing motion and am acquainted with the contents thereof and that the matters and things therein stated are true.

GEO. L. SANDS.

Subscribed and sworn to before me this 16 day of October, A. D. 1902. My term expires on the 10th day of January 1905.

(Seal) FRANK W. GRAVES,
Notary Public, City of St. Louis, Mo.

16 In the Circuit Court of the United States for the Eastern District of Missouri, Eighth Judicial Circuit.

Central Trust Company of New York, et al., Complainants,
Nos 2357 and 2464. vs. In Equity.
Wabash, St. Louis & Pacific Railway Company, et al., Defendants.

Consolidated Cause. March Term, 1902.

In the matter of the intervening petition of the City of St. Louis and the St. Louis, Kansas City & Colorado Railroad Company, filed herein July 12th, 1886.

To the Wabash Western Railroad Company and Wabash Railroad Company and their solicitors of record and Wells H. Blodgett, their solocitor: You are hereby notified that the annexed motion will be presented to the United States Circuit Court at St. Louis, Missouri, on the 6th day of November, 1902, at 10 o'clock a. m. or as soon thereafter as the court will hear the same.

JOHN H. OVERALL,
FRANK HAGERMAN,
M. A. LOW, and
W. F. EVANS.
Solicitors for the St. Louis, Kansas City & Colorado Railroad Company.

17 In the Circuit Court of the United States for the Eastern District of Missouri, Eighth Judicial Circuit.

Central Trust Company of New York et al., Complainants.
Nos. 2357 and 2464. vs. In Equity.
Wabash, St. Louis & Pacific Railway Company et al., Defendants.

Consolidated cause. March Term, 1902.

In the Matter of the Intervening Petition of the City of St. Louis and the St. Louis, Kansas City & Colorado Railroad Company, Filed herein July 12th, 1886.

Answer of the Wabash Railroad Company to the Application and motion of the St. Louis, Kansas City & Colorado Railroad Company.

Now comes the Wabash Railroad Company, one of the defendants named in said application and motion, and for answer thereto says:

(1) It admits that the petitioner, the St. Louis, Kansas City & Colorado Railroad Company, is a corporation organized for the purpose of and engaged in carrying on the business of a railroad, operating a line of railway as in said application stated, but as to the date of its organization, or
18 whether it was organized under the laws of the state of Kansas, this defendant is not advised, and therefore does not admit the same.

(2) It admits that on July 12, 1886, the Wabash, St. Louis & Pacific Railway Company owned, and by its receivers operated a line of railway in the state of Missouri, including the portion of railroad mentioned in the decree set forth in said application, and that said Wabash, St. Louis & Pacific Railway Company was at said time in the hands of receivers appointed in this cause.

(3) It admits that during the pendency of this cause, and while said property was being so operated by said receivers, and on July 12, 1886, there was filed in this cause a bill of intervention by the said city of St. Louis, and said St. Louis, Kansas City & Colorado Railroad Company, and that the purpose of such intervention was to obtain for said St. Louis, Kansas City & Colorado Railroad Company the right to the use of the right-of-way and the tracks upon the same for the purpose of ingress and egress to and from Eighteenth street in the city of St. Louis, state of Missouri, but not of any other or different property, or for any other or different use; and that thereafter upon December 31, 1886, this court entered herein a decree in words and figures substantially as set forth in said application, except as to certain repetitions therein.

(4) It admits that said decree was affirmed by the Supreme Court of the United States on January 19, 1891, and that said decree is now in full force and effect as in said application stated.

(5) It admits that at the time said bill of intervention was filed, on July 12, 1886, the property of said Wabash, St. Louis & Pacific Railway Company was in the possession
19 of Solon Humphreys and Thomas E. Tutt, receivers thereof, and included the property described in paragraph 5 of said application.

(6) It admits that subsequently a decree of foreclosure and sale was entered in this cause, and said property sold, and that under the terms of the decree, jurisdiction for certain purposes therein stated, was retained over said property, and that the property was conveyed to and vested in the Wabash Western Railroad Company, a corporation incorporated under the laws of the state of Missouri, but as to whether said Wabash Western Railroad Company entered its appearance herein, and has continued so to do as in said application alleged, this defendant is not advised, and therefore does not admit the same. But this defendant denies that the Wabash Western Railroad Company is now a party defendant to this cause, and avers that said Wabash Western Railroad Company is no longer in existence.

It denies that on or about July 29, 1889, said Wabash Western Railroad Company, under and pursuant to the statutes of Missouri, consolidated with the Wabash Railway Company into the Wabash Railroad Company, as in said application alleged, but admits that this defendant, the Wabash Railroad Company, has since the date last mentioned, been the owner of and in possession and control of said property, as grantee and

successor in title of said Wabash Western Railroad Company, and continuously since on or about said date has operated the same, and that it now claims to own and operate, and does own and operate said property, as successor in interest and title to said Wabash, St. Louis & Pacific Railway Company and its said receivers, and said Wabash Western Railroad Company.

It is not advised as to whether said Wabash, St. Louis & Pacific Railway Company, the said receivers and said
20 Wabash Western Railroad Company have ever since the affirmance of said decree by the Supreme Court of the United States, and up to and including the 7th day of May, 1902, fully recognized the validity of said decree, and the binding force of the duties and obligations imposed upon them therein, as in said application set forth, and therefore does not admit the same; but it does admit that the Wabash Railroad Company has, since it became the owner of said property, recognized the validity of said decree, and the duties and obligations imposed upon it therein, and has recognized the rights thereunder of the petitioner, as hereinafter shown, but denies that this defendant, or any of its said predecessors, has ever recognized the rights of the petitioner to be as in its said application claimed and set forth.

(7) It admits that the line of railway operated by petitioner crosses the line of this defendant at Forsythe Junction, in the city of St. Louis, and terminates at the intersection of Union avenue with the north line of Forest Park in said city, and that petitioner in the operation of its line of railway has no railway connection with or access to any other railway in said city other than over that portion of the line of defendant's railway referred to in said decree. Defendant further admits that the petitioner, up to the 7th day of May, 1902, has enjoyed the equal use and benefit of the right-of-way and the tracks, switches, side-tracks, turn-outs, turn-tables and other terminal facilities at and between the north line of Forest Park and Eighteenth street in said city of St. Louis, conferred upon and vested in it by said decree, and avers that it has likewise enjoyed the equal use and benefit of the same from said 7th day of May, 1902, to the present time, and still enjoys the same.

Defendant further admits that petitioner has, up to the
21 present time, paid the sum of thirty thousand dollars ($30,000.00) per annum, in installments of twenty-five hundred dollars ($2,500.00) each, as in said seventh paragraph of its application averred, except that such payments have not always been made promptly or on the 15th day of each month, as alleged. And defendant also admits that petitioner has paid its proportion of the expense per annum of maintaining said right-of-way, tracks, etc., including taxes upon said property as provided by said decree.

(8) Defendant admits that its line of railroad described in said decree connects at or near Eighteenth street in said city of St. Louis, with the tracks of the Terminal Railroad Association of St. Louis, and that all freight traffic destined to or from points upon the line of railway of petitioner passing over other lines of railway entering the city of St. Louis, must pass over the portion of the line of railway mentioned in said decree between Eighteenth street and the intersection of Union avenue with the north line of Forest Park. Defendant also admits that adjacent to said right-of-way, are tracks, side-tracks, switches, turn-outs, turn-tables, and other terminal facilities which have since the date of said decree been maintained and operated at the joint expense of the Wabash Western Railroad Company, this defendant and the petitioner, but denies that such maintenance and operation have been in the proportion of the use of the same by each of said parties, and denies that the petitioner has during said time had the use of any of said tracks, side-tracks, switches, turn-outs, turn-tables, or other terminal facilities outside the said right-of-way, by virtue of said decree. And the defendant avers that during all said time it had the sole use of said property, except as to such use as petitioner was permitted to make by agreement and consent of this defendant, and this defendant has received and
22 delivered the freight and cars of said petitioner to and from industries located along said right-of-way, for petitioner under an arrangement for said purpose made and entered into between them, whereby the expenses of operation of the same were paid by the petitioner and this defendant in the proportion of the cars handled for each of said parties, which agreement was entirely independent of and outside the terms and scope of the decree aforesaid.

(9) Defendant denies that the petitioner paid any proportion of the expense of constructing new tracks, new side-tracks, new switches, new turn-outs, or other betterments placed upon such right-of-way, and especially denies that petitioner paid any proportion of the expense of constructing new tracks or other betterments outside the said right-of-way.

Defendant denies, upon information and belief, that upon the hearing of said bill of intervention, the representatives of the then owners of said property mentioned in said decree, insisted that the compensaton to be paid the petitioner should be based upon the entire value of said right-of-way, main tracks, side-tracks, switches, turn-outs, turn-tables, and the use of all other terminal facilities, including the right to reach any industry then existing, or which might thereafter be established along said line, and the right to receive and discharge freight, and load and unload cars on sidetracks, and to transact any busi-

ness on said right-of-way and property which might be transacted by the owner of the same, and denies that such insistence, if made, could or does in any way, affect the rights of this defendant in respect to said property or otherwise; and it denies that in accordance with any such contention the court fixed the compensation at any larger or higher sum than it found
23 would have been the value based upon the mere right to use the main tracks and right-of-way upon which the same are situated. On the contrary, this defendant is informed and believes, and so states the fact to be, that in said proceedings and on the hearing of said bill of intervention, the representatives of said petition disclaimed any right beyond or outside said right-of-way, and did not claim the right to use said right-of-way except for the passage of its trains between said Union avenue and 18th street, and insisted that the compensation to be paid by the petitioner should be measured accordingly, and that in accordance with such contention, the court fixed the compensation to be paid by it as aforesaid, upon the basis of such use of said right-of-way and tracks thereon.

(10) It denies that its representatives, or the representatives of the Wabash Western Railroad Company, on or about May 7, 1902, for the first time claimed that the construction of the decree in said application set forth, was that the petitioner had no right thereunder except to use the main track upon said right-of-way for passing trains, and the side-tracks and passing tracks for the sole purpose of permitting trains to pass each other, and that petitioner had no right to use for any other purpose, any of the side-tracks, switches or turn-outs, and no right to the use of the other terminal facilities of said Wabash Western Railroad Company and this defendant, and had no right to reach any of the industries along the line thereof, or to load or unload cars, or to receive or deliver freight on any of said side-tracks, or on the right-of-way of this defendant, between said Union avenue and Eighteenth street; but avers that this defendant and its predecessors have always claimed and still claim, that petitioner has only the right of ingress and egress with its trains, engines, etc., to and from Eigh-
24 teenth street over this defendant's right-of-way, and no right to the use of said right-of-way or tracks, or other facilities thereon for any other purpose, and no right to reach any of the industries along said right-of-way, or to load or unload cars, or to receive or deliver freight, on any of said side-tracks, or on said right-of-way between Union avenue and Eighteenth street aforesaid, under said decree, and no such rights in the petitioner have ever been recognized by this defendant, or any of its predecessors, and have never been allowed

the petitioner, except by permission or arrangement entered into outside of and independent of said decree as hereinabove stated.

This defendant further states that petitioner's railroad and property was for a number of years in the hands of a receiver appointed by this court, which receiver was discharged and said railroad and property restored to petitioner by order of this court entered a short time prior to the 10th day of January, 1900, and that said petitioner was upon the restoration of its railroad and property to it as aforesaid, duly served with written notice on said 10th day of January, 1900, calling its attention to the fact that work and services were being performed for it, and privileges had been given it with respect to the property of this defendant, by agreement and arrangement outside of said decree, and expressing a willingness on the part of this defendant, in case petitioner desired to have it continue to perform such work and services, not required under said decree, or to furnish tracks or other terminal facilities outside said right-of-way, to endeavor to agree with petitioner upon the compensation to be paid by this defendant therefor; and that upon request of petitioner said prior temporary arrangement was continued by this defendant until the 7th day of May, 1902, when defendant refused to continue the same longer, for the reasons hereinafter stated; and defendant avers that since last mentioned date no efforts have been made on the part of petitioner to agree upon proper compensation, nor has any offer been made to pay such compensation. A copy of the written notice above referred to, together with its accompanying proof of service, is hereto attached, marked Exhibit "A" and made part of this answer.

And this defendant avers that the use of said right-of-way and tracks and other facilities thereon, covered by said decree, by the petitioner and this defendant for ingress and egress with their trains between said 18th street and Union avenue, makes it impracticable to use the same for other purposes, and precludes the use of said right-of-way and tracks and other facilities thereon for the purpose of loading and unloading cars, or receiving and delivering freight thereon, or for any purpose other than the passing of trains over the same between said Union avenue and 18th street, and neither this defendant nor any of its predecessors has since the date of said decree used said right-of-way or tracks thereon for the loading and unloading of cars, or for the receiving or delivering of freight, and has not permitted the petitioner to make such use of the same. But this defendant has heretofore, and up to the 7th day of May, 1902, handled petitioner's cars to and from industries along its said right-of-way as aforesaid, and by arrangement

entered into between them outside the terms of said decree; that defendant ceased to do said work for petitioner on said 7th day of May, 1902, for the reason that petitioner refused to agree upon or pay reasonable compensation therefor, and that this defendant is now and has ever since said 7th day of May, 1902, been ready and willing to switch and handle petitioner's freight and cars to and from all industries along said
26 right-of-way, if the petitioner would pay to it the reasonable and usual charges and compensation therefor.

This defendant denies that there are any switches or sidetracks located along said right-of-way in order to handle freight traffic for said industries, that were constructed by the petitioner and this defendant, or by petitioner and said Wabash Western Railroad Company jointly, or used and maintained by them according to any provisions of said decree, and this defendant denies that it has done or omitted to do any act, as regards petitioner, in violation of any of the terms and provisions of said decree.

Defendant further states that by the proper construction of said decree, the rights of petitioner in and to defendant's said property are as hereinbefore stated, and if, by the language employed in said decree, it may be given any other or different construction, the same is due to mistake and error of law apparent upon the record, and in such case, defendant asks that the same be reviewed in connection with the pleadings and evidence in said proceedings, and the requirements and conditions then and now existing in respect to the use of said property, and that said decree be revised and modified so as to correctly and clearly define and limit the right of the petitioner to the use of defendant's right-of-way between Union avenue and Eighteenth street, in said city of St. Louis, and the tracks sidetracks, etc., upon said right-of-way, and for the purpose only of ingress and egress with petitioners' trains, engines and cars to and from Eighteenth street.

This defendant, further answering, denies that petitioner is now or ever has been deprived of any of its rights under said decree by this defendant, or any of its officers, agents or employees, and denies that the petitioner is entitled to
27 the order asked against this defendant, or to the relief or any part thereof, as in its said application and motion prayed.

THE WABASH RAILROAD COMPANY,
By Wells H. Blodgett,
H. S. Priest,
C. H. Travous,
Its Solicitors.

United States of America,
Eastern District of Missouri,
Eastern Division—ss.

I, H. L. Magee, upon oath say that I am General Superintendent of the Wabash Railroad Company, the defendant above named, and that I have read the foregoing answer, and am acquainted with the contents thereof, and that the matters and things contained therein are true, as therein stated, except as to such maters and things as are therein stated to be upon information and belief, and as to said matters and things, I believe them to be true as therein set forth.

H. L. MAGEE.

Subscribed and sworn to before me this 14th day of November A. D. 1902.

My term expires on the 23" day of January, A. D., 1905.

(Seal) JOSEPHINE H. BAKER,
Notary Public, City of St. Louis, Missouri.

28 Exhibit "A."

January 9, 1900.

To the St. Louis, Kansas City & Colorado Railroad Company, and to John Scullin, Esq., President of said Company:

In view of the fact that the railroad and property of the St. Louis, Kansas City & Colorado Railroad Company was for a number of years in the hands of a receiver, appointed by the Circuit Court of the United States for the Eastern District of Missouri, Eastern Division, and in view of the further fact that said receiver was, by recent order of said court, discharged, and directed to restore said railroad and property to the company owning the same, it is deemed proper to advise you, at this time, that under the decree of said court, entered on or about December 31, 1886, in a cause entitled:

Central Trust Company of New York, et al., Complainants,
Nos. 2357 and 2464. vs. In Equity.
Wabash, St. Louis & Pacific Railway Company, et al., Defendants.

Consolidated Cause.

The City of St. Louis and St. Louis, Kansas City & Colorado Railroad Company, Intervenors."

It was adjudged that the St. Louis, Kansas City & Colorado Railroad Company was entitled, on the conditions there-

in set forth, to the use of the right-of-way of the Wabash, St. Louis & Pacific Railway Company through said
29 park, and to the use of the right-of-way of said Wabash Company thirty feet in width between said park and Eighteenth street in the city of St. Louis; and that soon after the entry of said decree a temporary arrangement was entered into between the Wabash Western Railroad Company and the St. Louis, Kansas City & Colorado Railroad Company under which the Wabash Western Railroad Company (which latter company had as assignee, succeeded to all the rights of the Wabash, St. Louis & Pacific Railway in the premises in question) whereby the Wabash Western Railroad Company did certain work and performed certain services (and its successor, the Wabash Railroad Company has continued to do work and perform services) for the St. Louis, Kansas City & Colorado Railroad and its said receiver, in the operation of its road and in the handing of its engines, cars and traffic, when by the terms of said decree neither the Wabash Western Railroad Company nor its successor, the Wabash Railroad Company, were required to do any work or perform any services for said St. Louis, Kansas City & Colorado Railroad Company. And, under said temporary agreement, the Wabash Western Railroad Company also permitted said St. Louis, Kansas City & Colorado Railroad Company to occupy and use certain of its real estate and the improvements and terminal facilities situated thereon, which were not within the right-of-way above described. And the Wabash Railroad Company, as assignee and successor of said Wabash Western Railroad Company, has also under said temporary agreement, continued, up to the present time, to permit said St. Louis, Kansas City & Colorado Railroad Company, and its receiver, to occupy and use certain real estate and the improvements and terminal facilities situated thereon, which were and are outside of, and not within or upon said right of way, when by the terms of said decree, said St. Louis,
30 Kansas City & Colorado Railroad Company, and its said receiver, were only entitled to use and occupy the right-of-way of said Wabash Railroad Company through said park, and said right-of-way thirty feet in width, between said Forest Park and Eighteenth street in the city of St. Louis, together with such tracks, side-tracks, switches, turn-outs, turntables, and other terminal facilities as are situated on said right-of-way.

The object of this communication is to direct your attention to the evidence and proceedings in said cause and the terms of said decree, and inform the new management of your company and its board of directors, of the arrangement heretofore existing outside of said decree, and thereby prevent any misapprehension with respect to your rights in the premises.

It is not the intention, however, of the Wabash Railroad Company to take summary action, looking to the immediate termination of the existing arrangement, earlier than the end of January, 1900, which will give ample time for negotiation, and in case you desire to have the Wabash Railroad Company continue to render services not required of it under the decree, or furnish tracks or other terminal facilities outside said right-of-way, we shall be glad to take the matter up with you, and endeavor to agree upon the compensation to be paid by you to the Wabash Railroad Company for such additional services and facilities.

Very respectfully yours,

(Signed) JOSEPH RAMSEY, JR.
Vice-President and General Manager
Wabash Railroad Company.

31 I, Fred Worheide, being first duly sworn, upon my oath state that I did, on the 10th day of January, 1900, at the city of St. Louis, State of Missouri, deliver a true copy of the above and within letter, signed by Joseph Ramsey, Jr., Vice-President and General Manager of the Wabash Railroad Company, to John Scullin, he being one of the parties to whom said letter was addressed.

(Signed) FRED W. WORHEIDE.

Sworn and subscribed to before me, a notary public within and for the city of St. Louis and State of Missouri, on this 12th day of January, A. D. 1900.

(Signed) JOHN ELLSPERMANN, JR.,
(Seal) Notary Public, City of St. Louis, Mo.

Term expires April 7, 1902.

33 In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Central Trust Company of New York et al., Complainants.
Nos. 2357 and 2464. vs. In Equity.
Wabash, St. Louis & Pacific Railway Company et al., Defendants.

Consolidated.

In the Matter of the Application and Motion of The St. Louis, Kansas City & Colorado Railroad Company, Intervenor.

The Replication of the St. Louis, Kansas City & Colorado Railroad Company to the Answer of the Wabash Railroad Company.

This repliant, saving and reserving unto itself now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto,
34 says, that it will aver, maintain, and prove its intervening petition, application, and motion to be true, certain and sufficient in law to be answered unto, and that said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto and not herein and hereby sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all of which matters and things this repliant is and will be ready to aver, maintain, and prove as this Honorable Court shall direct, and humbly prays as in its said intervening petition, application, and motion it has already prayed.

M. A. LOW,
FRANK HAGERMAN,
W. F. EVANS,
Solicitors for the St. Louis, Kansas City & Colorado Railroad Company.

The above replication may be filed, all objections as to the time of filing the same being waived.

W. H. BLODGETT,
H. S. PRIEST,
C. N. TRAVOUS,
Solicitors for The Wabash Railroad Company.

35 In the Circuit Court of the United States for the Eastern District of Missouri.

Central Trust Company of New York et al., Complainants.
Nos. 2357 and 2464. vs. In Equity.
Wabash, St. Louis & Pacific Railway Company et al., Defendants.

Consolidated.

In the Matter of the Application and Motion of The St. Louis, Kansas City & Colorado Company, Intervenor.

Partial Agreed Statement of Facts.

The parties hereby stipulate as part of the facts and testimony upon which this case is to be tried, as follows:

1. On and prior to July 12, 1886, the Wabash, St. Louis & Pacific Railway Company, hereinafter called the Wabash Company, owned a line of railway extending from St. Louis east and from that city north and west. Its right of

way and all lands owned by it on said 12th day of July, 1886, at and between Eighteenth Street, in the City of St. Louis, and the north line of Forest Park, where the same is intersected by Union Avenue, are shown on "Chart A," (except as to the scale), which is a part of the record in this case.

36 2. At that time proceedings were pending in this court, entitled "Central Trust Company of New York et al., complainants, vs. Wabash, St. Louis & Pacific Railway Company et al., defendants, in equity, numbers 2357 and 2464, consolidated causes."

3. By such proceedings the trustees in the mortgages upon the property of the Wabash Company sought to foreclose said mortgages, and on, prior to, and after July 12, 1886, the railroad property was operated by Solon Humphreys and Thomas E. Tutt, as receivers, appointed in the said cause.

4. Subsequently to the decree on the petition of intervention mentioned in paragraphs eight and nine hereof, a decree of foreclosure of said mortgages was duly entered in said cause, and by the terms of said decree and subsequent orders jurisdiction was retained over the property to the extent set forth in said decree, and orders, and which may be referred to as part of this stipulation.

5. Pursuant to the decree the property embraced therein theretofore owned by the Wabash, St. Louis & Pacific Railway Company in St. Louis between the north line of Forest Park and Eighteenth Street, was sold, and the title vested in the Wabash Western Railway Company, conditioned on the entry of appearance of that company as a party thereto, which appearance was duly entered.

6. Afterwards, upon July 29, 1889, under and in pursuance to the Statutes of Missouri, the Wabash Western Railway Company consolidated with the Wabash Eastern Railway Company of Illinois and other companies, forming the Wabash Railroad Company (hereinafter also called the Wabash Company), which thereby succeeded the right, title and interest of
37 the Wabash Western Railway Company, in and to the property in question, and has ever since owned and operated same, and still owns and operates same, and that for the purpose of this proceeding it is agreed, the Wabash Railroad Company shall be subject to all such liability and procedure under said decree as was the Wabash Western Railway Company.

7. The St. Louis, Kansas City & Colorado Railroad Company, hereinafter called the Colorado Company, was and has

been since prior to July 12, 1886, a railroad company organized under the laws of the State of Kansas, as appears from its charter, a copy of which is in "Exhibit B."

8. On July 12, 1886, while there were pending in this court, as aforesaid, proceedings to foreclose the mortgages upon the property of the Wabash Company, the Colorado Company and the City of St. Louis filed their petition of intervention, which was subsequently amended, and proceedings had thereon, resulting in the taking of testimony, reports of the master, and exceptions thereto. Said petition and amendment, and the answers thereto, and all the proceedings had thereon, down to and including the exceptions to the master's report, are set forth in the copy hereto attached, marked "Exhibit B," and made part hereof, except the time card of the Wabash Railroad Company, marked "Exhibit D," in said record, which may be offered in evidence by either party.

9. The intervention came on for hearing before the court upon the reports of the master and the evidence adduced before him, and a decree was entered in the form set forth in the application filed herein by the Colorado Company.
38 Opinions were delivered by the judges, which are reported in 29 Federal Reporter 546-561. Said opinions are hereby referred to with the same force and effect as if copied herein.

10. An appeal was prosecuted in the Supreme Court of the United States from said decree in said intervention, by the purchasers of the property of the Wabash Company, under the decree of foreclosure, by the trustees under the mortgages sought to be foreclosed, and by the Wabash Company. The case is reported in 138 U. S. 1-51, a reference to which report is hereby made the same as if set out herein.

A formal judgment of affirmance was entered by the Supreme Court, which Court issued its mandate of affirmance to the lower court, directing it to carry out its decree, which mandate was in due time filed herein.

11. The expenses of the taxes assessed as herein stated, since the entry of said decree on said intervention, have been borne in the first instance by the Wabash Company and its predecessors, and the proportionate part thereof charged to and paid by the Colorado Company. Up to May 7th, 1902, the course pursued as to the payment of taxes was as follows: The Wabash Company and its predecessors paid all taxes upon the property embraced in the decree, and the amount thereof was divided between the Wabash Company and the Colorado Company upon the basis provided for in the decree (in the proportion which the number of wheels each of said companies

caused to be passed over the main track or parts thereof, between said points per annum, bore to the total number of wheels that both of said companies caused to be passed over the same during the year). The manner in which was as-
39 certained the portion of taxes to be paid under the terms of the decree, was this: The Wabash Railroad extended through many other counties in the state. The entire property of this line of the Wabash Company in Missouri, including all of its right-of-way, side-tracks, switches, turn-tables, yards and other terminal facilities, were under the law ascertained by the State Board of Equalization and assessed at so much per mile of single main track; that is to say, the total value thus ascertained was divided by the total number of miles of single main track in the state, and the valuation per mile of single main track so ascertained was distributed in accordance with the number of such miles therein, to the various counties and cities in the state; so that there was assessed and levied against and collected of the Wabash Company in St. Louis, a tax on such proportion of the entire value of its entire railroad property in the state, as the number of miles of single main track in St. Louis bore to the entire number of miles of single track in the state. In fixing the amount of tax to be charged under the decree, this course was pursued: The actual distance of a single main track from Eighteenth Street to the north line of Forest Park, four and forty-two one-thousandths (4.042) miles, was multiplied by the valuation per mile of single track as fixed by the State Board of Equalization, and the result so obtained was divided between the Wabash and Colorado Companies in the proportion which the number of wheels each of said companies caused to be passed over the main track or parts thereof, between said points, bore to the total number of wheels both of said companies caused to be passed over the same during the year.

40 12. Up to May 7, 1902, the course pursued as to the maintenance was this: The Wabash Railroad Company and its predecessors rendered to the Colorado Company, bills, in the form of vouchers, for its proportion upon a wheelage basis, as aforesaid, of the cost of maintenance of all of said property between said north line of Forest Park and Eighteenth Street, except as stated in paragraph fourteen hereon, and these were paid by the Colorado Company yearly. But as to whether all or any portion of said charges or payments were made under said decree, or under an agreement of the parties existing outside of the decree, or otherwise, the parties cannot agree.

13. Up to May 7, 1902, the fixed charge of Two Thousand, Five Hundred Dollars ($2,500.00) per month, as determined

by said decree, was paid by the Colorado Company to the Wabash Company, or its predecessors in title, upon bills in the form of vouchers for that item.

14. There are leading from the main track and right of way between the north line of Forest Park and Eighteenth Street various side-tracks constructed prior to the entry of the decree of intervention and thereafter. These side-tracks lead to private industries, and were constructed and have been maintained under certain contracts made by the Wabash Company or its predecessors in title and the owners of said industries, the terms and conditions of which contracts are practically the same as those contained in the copy of one of the same hereto attached, and marked "Exhibit C." The said side-tracks and the dates of their construction, so far as the parties are able to agree on said dates, are shown on the map hereto attached, and marked "Exhibit D." As to what, if any, part of the costs of the construction or maintenance of said side-tracks was charged to or paid by the Colorado Company, the parties cannot now agree; and that subject is left open for future stipulation, and if the parties cannot subsequently agree, and in case of failure to so agree, then for proper proof.

41

15. From a time shortly after the entry of the decree on said intervening petition, the Wabash Company and its predecessors, did all of the terminal work of the Colorado Company, such as switching cars in the yards and terminals between said points, and in carrying the cars of the Colorado Company to and from any private industries located along the line of the road, and in making up trains and in preparing them to go out, and in breaking up trains and placing cars, and in taking them and from their places of loading and unloading. The Colorado Company had no switch engines nor crews, and no employes engaged in such terminal work. All this work was done by Wabash employes and with engines of the Wabash Company or its predecessors in title. As to what, if any, arrangement about this was made between the representatives of said Wabash Company and said Colorado Company is left for proof, if the parties do not hereafter agree as to the facts.

An account was kept by the Wabash Company, or its predecessors, of the entire expense of this character of work upon all the property between Eighteenth Street and the north line of Forest Park, and such proportion thereof was charged to and paid by the Colorado Company as the number of its cars handled between such points by the switch engines of the Wabash Company, or its predecessors in title, bore to the whole number of cars of both roads handled by such switch engines.

42 Separate bills for this work were rendered monthly by the Wabash Railroad Company or its predecessors in title upon that basis.

16. On or about May 7, 1902, the Wabash Company insisted that the bills for the cost of the switching services performed by it for the Colorado Company must be paid monthly, because it claimed the service so performed was entirely separate, distinct from, and outside of the decree rendered in the intervention aforesaid, and notified said Colorado Company that unless such bills were paid monthly it would cease doing said work. The Colorado Company declined to pay these bills monthly, and on May 7, 1902, the Wabash Company ceased to do said work, and afterwards the Colorado Company advised the Wabash Company that it desired to do with its own engines and crews the character of work mentioned in paragraph fifteen hereof, and the Wabash Company refused to permit the engines and crews of the Colorado Company to enter upon the tracks for the purpose of doing such work. Thereupon the present controversy arose.

17. Either party may at the hearing offer any portion of the record of the proceedings of intervention and on the appeal therefrom, including all papers and briefs filed therein, and all exhibits, subject to any objection as to materiality and relevancy, and such other evidence, not contradictory to the facts agreed on, as either party may offer at such time as the court will hear the same; and if there shall be any material issues of fact upon which the parties cannot agree, the court may, if it shall decline to determine the case without reference, refer the same to a master with directions to him to take testimony
43 upon such points as the court may order; and if any exhibit or other evidence is omitted from "Exhibit B," attached hereto, that was in evidence and a part of the record of said intervention proceedings, the same may be considered as a part thereof and introduced in evidence herein by either party.

18. Neither party hereto waives the right to question the relevancy or competency of any matters of fact outside of the record in said intervention proceedings, as evidence in this proceeding, but on the contrary expressly reserves the right to object to the admission and consideration of any such matters as evidence in this proceeding, on the ground of irrelevancy or incompetency, anything in this stipulation contained to the contrary notwithstanding.

19. This stipulation as to facts is made for the sole purpose of the hearing of the present controversy, and is not to be used as any admission for any other purpose in any other contro-

versy, and this stipulation shall not prejudice any right or claim of either party hereto, in any other proceeding.

Dated this July 13, 1903.

M. A. LOW,
FRANK HAGERMAN and
W. F. EVANS,
Solicitors for The St. Louis, Kansas City & Colorado Railroad Company.

WELLS H. BLODGETT,
H. S. PRIEST,
C. N. TRAVOUS,
Solicitors for the Wabash Railroad Company.

44 Copy of fifth paragraph of appellant's printed brief in Supreme Court United States, in Joy et al. vs. City of St. Louis and St. Louis, Kansas City and Colorado Railroad Company:

V.

"The Court erred in entering a decree broader than the contract.

Even if the ninth clause of the tripartite agreement was binding on the Kansas City Company, it only required it to permit other railroads to use its 'right-of-way,' and yet a decree was entered giving respondent the use of 'the right-of-way, tracks, switches, turn-outs, turn-tables and other terminal facilities of the Wabash Company' at St. Louis.

Again, the decree is not only broader than the contract, but it is broader than the prayer of the petition. The prayer of the petition is, that the Colorado Company be permitted to use the right-of-way of the Wabash Company, 'commencing at the north line of said park, thence over said right-of-way to Eighteenth street in said city of St. Louis, by running its engines and cars over and upon said right-of-way, including the tracks of said Wabash Company between said points.'

The contract only related to 'right-of-way;' the prayer of the petition was for the use of 'right-of-way and tracks,' and the decree not only gives them the use of the 'right-of-way and tracks,' but it subjects to the use of respondent the 'switches, side-tracks, turn-outs, turn-tables and other terminal facilities,' and even goes so far as to require the Wabash Company to keep those additional properties in repair for respondent's use.

Therefore, no matter what view be taken of the case
44a in other respects, the decree was erroneous in two particulars: First, because it is broader than the covenant;

and second, because it is broader than the prayer of the bill. Both of these objections are elementary."

Copy of twelfth paragraph of appellees' printed brief in Supreme Court United States in Joy et al. vs. City of St. Louis and St. Louis, Kansas City & Colorado Railroad Company.

"Twelfth. The contract permits other roads to use the tracks of the County and Kansas City roads, and the decree gives the use of the tracks, including turn-tables and other terminal facilities of the Wabash Company on its right-of-way. The record shows that the width of the right-of-way of appellants at Tayon avenue or Eighteenth street, being the terminus of the road at the Union Depot, is about forty feet. This is shown by Chart A, in evidence. The side tracks, turn-outs, etc., mentioned in the decree at the terminus are upon this forty feet, which is the right-of-way. Appellants have no depot of any kind, freight or passenger, to be used by any other road—the turn-table, of course, is necessary for use of the tracks, as also the switching and siding.

Respondents, under the decree, could only use what the evidence shows the appellants had, hence there is nothing in the contention that the decree is broader than the provisions of section 9, or the prayer of the bill.

The record further shows that the Union Depot Company take charge of all trains, and have side-track facilities for loading and unloading trains. (See Record, p. 115)."

45 Exhibit B.

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47 United States of America, Eastern District of Missouri.

In the Circuit Court of the United States, for the Eastern District of Missouri.

Central Trust Company of New York et al., Complainants,
vs. In Equity.
Wabash, St. Louis & Pacific Railway Company et al., Defendants.

Consolidated Cause.

To the Honorable the Judges of said Court:

Your orators, the city of St. Louis, a municipal corporation duly authorized, organized and acting under the laws of the state of Missouri, and a citizen of said state of Missouri, and

the St. Louis, Kansas City & Colorado Railroad Company, a corporation duly authorized, organized and acting under the laws of the state of Kansas, and a citizen of the said state of Kansas, intervening herein, complain of the Wabash, St. Louis & Pacific Railway Company, a corporation duly authorized, organized and acting under the laws of the state of Mis-
48 souri, and a citizen of said state of Missouri, in said Eastern District, say:

First: That on the.....day of.....1884, by the order of this Court, Solon Humphreys and Thomas E. Tutt were duly appointed Receivers of the said Wabash, St. Louis & Pacific Railway Company, and that they are no wsuch Receivers, and in charge of the property, affairs and business of said company, as officers of this Court, subject to its direction; that said Wabash, St. Louis & Pacific Railway Company owns a right of way with a standard gauge track thereon in the city of St. Louis, commencing at 18th street in said city near Poplar street, at the Union Depot in said city, running west to the east line of Forest Park in said city; thence through said park to Union avenue in said city; thence in a northeasterly direction to the town of Ferguson in the county of St. Louis; thence in a northerly direction to the city of Moberly in the county of Randolph, state of Missouri; thence west to Kansas City; and thence north to Ottumwa, Iowa. That prior to the 11th day of August, 1875, the St. Louis, Kansas City & Northern Railway Company was a railroad corporation of the state of Missouri, and then owned a line of railway in the city and county of St. Louis, running to a point opposite the city of St. Charles in St. Charles County, state of Missouri, passing through the town of Ferguson in St. Louis County; thence in a direct line to the city of St. Louis, at or near Biddle street on the levee of said city. That on said 11th day of August, 1875, said St. Louis, Kansas City & Northern Railway Company, being desirous of obtaining an entrance to the said Union Depot in said city of St. Louis, which depot was then and is now located at or
49 near 18th and Poplar streets in said city, for the purpose of reaching said Union Depot at said point, determined to build a branch railway from said town of Ferguson in said St. Louis County, extending in a southeasterly direction from said town of Ferguson to Union avenue in the city of St. Louis, thence through said Forest Park; thence to said 18th street in the city of St. Louis at said Union Depot.

Complainants further state that at said date, that is to say, August 11th 1875, the body of land consisting of about 1,300 acres known as "Forest Park," and which was then situated in the county of St. Louis, and near the western limits of said city of St. Louis, was under the control and management of a

Board of Commissioners, of which Andrew McKinley was President, and Charles Bland Smith was Secretary; that said Board of Commissioners were duly appointed and acting under an act of the legislature of the state of Missouri, approved March 25th, 1874, being an entitled "an act to establish Forest Park, in the county of St. Louis, and to provide for the establishment and government thereof, and to provide for the issue of bonds by the County Court of St. Louis county for the purposes of said park, and for the purchase and condemnation of lands for the same."

That under and by virtue of the said act, the said Board of Commisisoners did duly establish said Forest Park for the people of the county of St. Louis. That the said Board, under the said act, had power to lay off, improve, adorn, and generally govern, manage and control the use of said park, and the avenues surrounding the same, together with other powers given and granted under and by said act.

50 That prior to the 11th day of August, 1875, the St. Louis County Railway Company, a corporation duly authorized, organized and acting under the laws of the state of Missouri, was the owner of a right of way for its road through said park, commencing at a point on the north side of said park, where Union avenue intersects said park; thence in a southeasterly direction through said park, to the eastern line of the same; thence in the same direction to said 18th street in the city of St. Louis at the said Union Depot. That the said St. Louis, Kansas City and Northern Railway Company found it necessary, in order to complete and operate its said branch railway from said town of Ferguson to said Union Depot, to obtain a right of way from said Board of Commissioners through said park; that, thereupon, on the 11th day of August, 1875, the said St. Louis, Kansas City and Northern Railway Company and the said St. Louis County Railroad Company entered into an agreement for the joint use of the right of way of said St. Louis County Railway through said park and up to the terminus of its road in the city of St. Louis at 18th street.

That by the terms of said agreement, the said St. Louis County Railroad Company, and the said St. Louis, Kansas City and Northern Railway Company were to own the right of way and the railway thereon, from said point on north line of said park, to a point on east line of said park, and to a point at east end of tunnel, and cut next east of said east line of said park, and enjoy the joint use thereof for the purposes of their respective roads. The said St. Louis, Kansas City and Northern Railway Company was to advance all sums necessary to complete

the construction of the railway between the said points,
51 and the said St. Louis County Railroad Company was to pay to said St. Louis, Kansas City and Northern Railway Company one-half of any sum so advanced by it for the purpose last aforesaid. That, by the said agreement, if the said St. Louis County Railroad Company failed to pay said one-half of said sum, being about the sum of $125,000, to said St. Louis, Kansas City and Northern Railway Company, it could not enjoy the use of said railway between the said points. That the said St. Louis County Railroad Company did fail to pay the said one-half, as provided in and by the said contract, and thereupon the said St. Louis, Kansas City and Northern Railway Company, under the said agreement and the tripartite agreement herein mentioned, held the said right of way under and subject to the terms thereof, a duly certified copy of which agreement is herewith filed, marked Exhibit "A."

That after the execution of said agreement, to-wit: on the 11th day of August, 1875, the Board of Forest Park Commissioners and the said St. Louis County Railroad Company, and said St. Louis, Kansas City and Northern Railway Company, duly entered into a certain tripartite agreement of that date, duly recorded in the Recorder's office of the city of St. Louis September 5th, 1879, in book 620, page 8, whereby the said Board of Forest Park Commissioners granted and conveyed unto and licensed and permitted the said St. Louis, Kansas City and Northern Railway Company, its successors and assigns, to have, hold, use and enjoy the said right of way, forty-two feet wide, theretofore owned by said St. Louis County Railroad Company in, upon and through said park, in common with and to be held and enjoyed jointly with, said St.
52 Louis County Railroad Company and its assigns, on the terms of the said contract between them, and under the terms and conditions, that said St. Louis, Kansas City and Northern Railway Company, its successors and assigns, should permit other railroads to use its right-of-way in and through said park, and up to the terminus of its road in the city of St. Louis, upon such terms and for such fair and equitable compensation to be paid to it therefor as might be agreed upon by said companies. A certified copy of said agreement is herewith filed, Exhibit "B."

Said St. Louis, Kansas City & Northern Railway Company, in the year 1875, subsequent to the execution of and under said agreement, did construct said railroad from said Eighteenth street to said Union Avenue, and soon thereafter built its said road from said town of Ferguson, and entered upon and operated the same from said town of Ferguson through said park to said Eighteenth street, the point where the said Union

Depot is located. That on the ..... day of ....., 1879, the said St. Louis, Kansas City & Northern Railway Company, then in the exclusive possession of said right-of-way and railroad, duly assigned, conveyed and transferred all its property, rights and franchises of whatever nature, to the defendant, the Wabash, St. Louis and Pacific Railway Company, and since said date the said latter company has used, enjoyed and operated all the property formerly owned by said St. Louis, Kansas City and Northern Railway Company, including the said railroad from said Union avenue to Eighteenth street, and now in the exclusive possession and enjoyment thereof. That on
53 the ..... day of ....., 1876, the limits of the said city of St. Louis were lawfully extended westwardly, so as to include the whole of said Forest Park; and said city duly became, and is now, the owner of the said park, with full power to control and manage the same. The said Board of Forest Park Commissioners was in the year 1876, by law duly abolished, and the said city then became, has ever since been and is now, the successor of said Board of Forest Park Commissioners, and the owners of said park, and invested with all the rights reserved by the said board under the contract or otherwise heretofore made for or on behalf of said park by the said board. That the said city of St. Louis, one of the orators herein, is by law charged with the duty of protecting the said park and interested in preventing the said park from being cut up by lines of railway seeking entrance to said city; and in limiting other railroads, including said St. Louis, Kansas City & Colorado Railroad Company, to the use of said right-of-way through said park, and to said Union Depot, and in enforcing the said tripartite agreement for the benefit of said St. Louis, Kansas City & Colorado Railroad Company, and other railroads that may seek an entrance through said park to said Union Depot. That the said city is a large municipal corporation, having a population of about 500,000 inhabitants—is an important commercial center to which different lines of railway from year to year are seeking entrance to its Union Depot—the said Union Depot is a point to which all railways entering said city converge. That to avoid the cutting up of said park, and thereby destroy its beauty and attractiveness, as well as to afford facilities for other railways to enter the said Union Depot, said Board of Commissioners in and by the said
54 tripartite agreement of August 11th, 1875, imposed the condition that the said St. Louis, Kansas City & Northern Railway Company, its successors and assigns, should permit other railroads under such reasonable regulations and terms as might be agreed upon, to use its said right-of-way through the said park and up to the terminus of its road in the city of St. Louis, upon such terms and for such fair and

equitable compensation to be paid as might be agreed upon by said companies. That the said Wabash, St. Louis & Pacific Railway Company now holds and enjoys the said right-of-way through and under the terms and conditions of the said agreements and not otherwise.

Your orators further say that the St. Louis, Kansas City & Colorado Railroad Company has completed its railway of standard gauge from the city of St. Louis to Creve Coeur Lake, a distance of about twenty miles, and that the same is now ready for operation. That it is engaged in further constructing its road in the State of Kansas, as well as in the State of Missouri with a view of operating the same from said State of Kansas into and through the State of Missouri to said City of St. Louis; that its railway which has been built from said Creve Coeur Lake to the City of St. Louis, now forms a junction with the railway of said Wabash, St. Louis & Pacific Railway Company at Forsyth Junction, a point at or near the north line of said park at said Union Avenue, and desires to avail itself of the provisions of said tripartite agreement by using the right of way of said Wabash, St. Louis & Pacific Railway Company through said park, and to the terminus of its road in said City of St. Louis, at 18th street at said Union Depot. That said St. Louis, Kansas City & Colorado Railroad Company was duly incorporated as aforesaid on ..... the day of ..... 1884, and has constructed its railway as aforesaid since said date.

Your orators allege that by and under the terms of said tripartite agreement, the said St. Louis, Kansas City & Colorado Railroad Company is now entitled to the use of said right of way of said Wabash, St. Louis & Pacific Railway Company through said park and up to the terminus of its road in the city of St. Louis at said 18th street, the said right of way being about four miles in length, by paying to it a fair and equitable compensation for such use. That the said St. Louis, Kansas City & Colorado Railroad Company has applied to said Receivers, Solon Humphreys and Thomas E. Tutt, for the use of said right of way on the terms of said tripartite agreement, and endeavored to agree with them upon the amount of money to be paid to them as a fair and just compensation for the use of said right of way; but said Wabash, St. Louis & Pacific Railway Company, through said Receivers, refused absolutely and unqualifiedly, and do now refuse to permit said St. Louis, Kansas City & Colorado Railroad Company to run its trains over its said right of way upon any terms, and deny that said company has the right to use said right of way as claimed. The said St. Louis, Kansas City & Colorado Railroad Company have offered to pay them such fair and equitable compensation

as may be just, and now offers to pay such fair and equitable compensation as this Honorable Court by its order and decree may require.

Your orators further state, that by reason of the refusal of of the said Wabash, St. Louis & Pacific Railway Company,
through the said Receivers, to permit the use of said right
56 of way as aforesaid, the interests of the City of St.
Louis are suffering, and the said St. Louis, Kansas City & Colorado Railroad Company is prevented from operating its railway, and has thereby suffered and is now suffering irreparable damage and loss by reason of the refusal aforesaid.

Wherefore, [you] orators pray that a writ of injunction issue out of and under the seal of this Honorable Court, enjoining and restraining the said Wabash, St. Louis and Pacific Railway Company, and the said Solon Humphreys and Thomas E. Tutt, as such Receivers and each of them, and of their agents, servants, counsellors and employees, from in any manner refusing to permit your orator, the St. Louis, Kansas City & Colorado Railroad Company, under such reasonable regulations and terms as to this Court may seem proper, from using the said right of way of said Wabash, St. Louis & Pacific Railway Company, commencing at the north line of said park where the railway of said Wabash, St. Louis & Pacific Railway Company enters said park, thence over said right of way to said 18th street in said City of St. Louis, by running its engines and cars over and upon said right of way including the tracks of said Wabash, St. Louis & Pacific Railway Company between the points at said Union avenue and said 18th street. That a temporary injunction pending the said hearing thereof against the said defendants as herein prayed be granted; that the said receivers, Solon Humphreys and Thomas E. Tutt be ordered to permit said St. Louis, Kansas City, & Colorado Railroad Company to use said right of way and tracks between said points last above named on the terms aforesaid, and that your orators
may have such further relief in the premises as is con-
57 sistent with equity and good conscience, and as to this
Honorable Court may seem meet.

May it please your Honor to grant unto your orators a writ of subpoena directed to the defendants and thereby commanding them and each of them to be and appear before this Honorable Court at some certain date to be fixed therein, and answer the premises and abide by and perform such order and decree

as may be passed therein, and as to your Honor shall seem meet. And your orators as in duty bound will ever pray.

LEVERETT BELL,
Solicitor for the City of St. Louis.

NOBLE & ORRICK,
Solicitors for St. Louis, Kan. City & Col. R. R. Co.

Dyer, Lee & Ellis,
of Counsel.

United States of America,
Eastern District of Missouri—ss.

L. M. Potter being duly sworn says that he is the President of one of the complainants, the St. Louis, Kansas City & Colorado Railroad Company named in the above bill, and that the matters alleged and set forth in the above bill so far as they are stated upon knowledge, are true, and so far as they are stated upon information and belief, he believes them to be true.

L. M. POTTER.

State of Missouuri,
City of St. Louis—ss.

Sworn to and subscribed before me, this tenth day of July, A. D. 1886.

Witness my hand and official seal.

C. D. GREENE, JR.,
Notary Public.

58 Agreement between

St. Louis County Railroad Company
and
St. Louis, Kansas City & Northern Railway Company.

This Agreement, made this eleventh day of August, A. D. 1875, by and between the St. Louis County Railroad Company, party of the first part, and the St. Louis, Kansas City and Northern Railway Company, party of the second part, witnesseth: That the party of the first part, a railroad corporation of Missouri, having acquired the title to or right of way over numerous pieces of land along its route, for a railroad, as designated on Chart "A," hereto annexed, and the deeds for which are herewith shown to the party of the second part, and the party of the second being also a railroad corporation of Missouri, and the lines and routes of said companies, as now established, being continuous and connected in this state, and for the purpose of reaching the Union Depot at St. Louis, Missouri, and other purposes, the party of the second part, desiring

and requiring a right of way and the real estate necessary to establish and maintain its route thereto forever, over a part of the right of way and real estate of the party of the first part, as well as over the lands of others, and having power under the laws to acquire a right of way along its said es-
59 tablished route, either by purchase, condemnation or otherwise, and along and over the lands of the party of the first part or others, and through Forest park as well as outside thereof.

And whereas, it is desirable and intended to have an amicable adjustment of all differences and conflicting claims and rights.

Now therefore, the parties hereto, each for itself, its successors and assigns, do covenant, promise and agree, as follows:

The party of the first part, in consideration of the premises and of the covenants, promises and agreements of the party of the second part herein contained, does hereby covenant, promise and agree to grant, bargain, sell and convey by good and sufficient deed or deeds of general warranty out of each and every tract or parcel of land now held or owned by it, and which tracts of land are designated on said chart "A," a lot twenty-eight (28) feet in width, and extending through each of said tracts, from the blacksmith shop at the junction of the Olive street road and the old Bonhomme road in St. Louis county, to the northern line of Forest park; and also, a lot of same width (28 feet), extending through each of said tracts, from the eastern line of Forest park to the western limits of the city of St. Louis; and also a lot thirty (30) feet in width, extending through each of said tracts, from said city limits to Tayon avenue, in said city of St. Louis; and also, an undivided one-half of all the right, title or interest of the party of the first part, of, in or to the right of way, and of, in or to any and all other rights, privileges and franchises, powers and immunities owned by or vested in or enjoyed by, or that
60 may hereafter be acquired and owned by, vested in or enjoyed by, the party of the first part, in, through or upon Forest park, by any means or from any source whatever.

It being understood, however, that where the party of the first part has only the right of way over any of said tracts outside of said park, it shall convey by said deed or deeds said right of way; and where said first party has not and does not claim to have a width of land, or right of way equal to the width above called for, but some lesser width, it shall convey by said deed or deeds, all of said lesser width; but in all cases, all the right, title and interest of said party of the first part as claimed by it, shall, to the width of lot herein agreed upon, be conveyed

by said deed or deeds to the party of the second part, its successors and assigns, so as to make a regular, continuous and practicable route, road-bed and right of way for the party of the second part, so far as the party of the first part is able to grant it, and as laid down and marked out on said Chart "A," hereto annexed and referred to.

And whereas, there is a tunnel and cut to be made by the party of the second part as contemplated, extending eastwardly from the eastern line of said park; said party of the second part hereby covenants and agrees to let the trains of the party of the first part pass through said tunnel and cut, under the same regulations and restrictions as to running and time tables as herein agreed upon concerning trains in said park and elsewhere.

To have and to hold all and singular, said lots, rights of way, and other property unto said party of the second part, its successors and assigns forever, with all the rights, privileges and franchises, powers, immunities, improvements and appurtenances thereto belonging or in anywise appertaining.

61

And with the additional and especial right and privilege to the party of the second part, its successors or assigns, to make all necessary, proper or usual cuts and fills on the property of the party of the first part, so as to give at least twenty-eight or thirty feet (as the case may be) at grade to the party of the second part for its tracks; and it is fully understood and agreed that this right and privilege to make cuts and fills shall be had and enjoyed by the party of the second part, its successors or assigns along the whole route, and shall extend not only to the lots above agreed to be conveyed but to any others it may acquire, and where the party of the first part may have or acquire lands or rights of way or other interests adjacent. Provided, however, that the use and enjoyment of the rights, privileges and franchises, powers, immunities, improvements and property in, through and upon Forest Park, and in, through and upon said proposed tunnel and cut adjoining the eastern line of Forest Park and under Barnes avenue and to the eastern end of said cut, shall and are to be in common and jointly used by the parties hereto, their successors and assigns.

But is agreed and [covenated], that to accommodate the running arrangements of the party of the second part, said party of the second part shall have the absolute and sole control of the running, starting and regulating of the time tables of and for its own trains; and it is further agreed and covenanted, that

no train, locomotive, car or other conveyance of the party
62 of the first part, its successors or assigns, shall be allowed or attempted to be started or run within eight (8) minutes of the time fixed, or stated for the starting, coming in or running of the train or trains of the party of the second part, its successors or assigns; and there shall be twenty minutes time between the starting and coming in of the trains of the party of the second part; and this matter as to said specified times shall be under the sole control and regulation of the party of the second part. And it is further agreed and convenanted, that the party of the first part shall have and maintain the only depot in said park as far as the parties hereto are concerned, and that said party of the second part shall not have a depot nor stop any of its trains in said park.

And said party of the second part, for and in consideration of the premises and other, the covenants, promises and agreements of the party of the first part herein contained, does hereby covenant, promise and agree to pay to the party of the first part, its successors and assigns within sixty days from the delivery and ratification of these presents and the deed or deeds hereinbefore provided for, the sum of one hundred and twenty-five thousand dollars ($125,000) in currency, for which it is to make its notes in sums of five thousand dollars each, at the date and as of the date of said delivery and ratification hereof, reserving the sum of thirty-seven thousand dollars, which sum is to be placed at said delivery and ratification in the hands and possession of John R. Lionberger, of St. Louis, as trustee, who shall therewith pay off the notes and indebtedness of said party of the first part, secured by certain deeds of
trust of record on portion of the property now owned
63 by the party of the first part, and if anything remains after said payments are made by said trustee, he shall pay it over to the party of the first part, its successors or assigns.

And whereas, at two certain points or places, to-wit: At and from the eastern line of Compton avenue, thence eastward not exceeding two hundred feet, and also at and from the point five hundred and fifty feet west from Tayon avenue, and thence eastward toward Tayon avenue as far only as necessary, where the right of way or property of said party of the first part is narrowest, it may become desirable and necessary to said party of the first part to lay one rail on said property to be conveyed to said party of the second part, it is therefore hereby mutually convenanted and agreed, that at said designated places the party of the first part will use the street or streets adjacent thereto if it can legally do so, and the grade of said street or streets is suitable and conforms to the grade of the road, but if the

streets cannot be so used or should not so conform, the party of the second part shall allow the party of the first part to lay and use one rail upon the property of the party of the second part for such distance as is necessary, provided, however, that the placing and running and passing of trains at said places shall be under such regulations as may be mutually agreed upon.

And it is hereby further mutually covenanted, promised and agreed that neither party shall in any manner, directly or indirectly, interfere with, obstruct, hinder or compete with the other in acquiring its own property or right of way for a continuous line or route as herein contemplated, and on Chart "A"
marked down, or in having, holding and enjoying any
64 right of way or property when so acquired. And where
proceedings for condemnation or other process, or proceedings or negotiations have been commenced by the party of the first part or on its behalf, the same shall as to the width hereby agreed to be conveyed and contemplated to be acquired and enjoyed to and by the second party, be discontinued or prosecuted as the party of the second part, by its president, may in writing direct, and within five days thereafter, said second party paying the damages and expenses therefor.

And whereas, under this agreement, and a certain agreement between the parties hereto and the Commissioners of Forest Park, of even date herewith, the party of the second part is about to and hereby in consideration of the covenants and agreements of the party of the first part, hereinafter particularly set forth, and of the covenants and agreements of said Commissioners of Forest Park in said agreement with them contained, does covenant and agree to construct and maintain a railroad bed and road, in upon and through said Forest Park and the tunnel and cut hereinbefore specified, according to certain plans and specifications agreed upon, and according to the terms and conditions of said agreement with said Commissioners for the joint use of both the parties (of the first part and of the second part) hereto, their several successors and assigns.

And in consideration of all the premises, and as inducement to said party of the second part to proceed with said construction and maintaining, the party of the first part does hereby covenant, promise and agree to pay to the party of the second
part, its successors and assigns, within two years from
65 the delivery of these presents, as shall be indorsed hereon by either party, one-half of the actual cost of construction of said roadbed and road through said park and said tunnel and cut, unless within said two years said party of the first part determines it will not use the same or any part there-

of, and delivers to said party of the second part a good and sufficient deed, granting and conveying to said party of the second part, its successors and assigns, any and all right, title or interest in law or in equity it may have in and to said roadbed, road or property in said park, tunnel and cut, free and clear of all incumbrances. And if said election and conveyance is not made within the time specified by it, said party of the first part does covenant and agree to pay besides one-half of the cost of construction, also the one-half of the actual cost of maintaining said roadbed and road in, upon and through said park and said tunnel and cut, from and after the time the party of the first part commences to use the same during or within the said period of two years, and as long as it continues to use the same, within said period of two years, and if it continues to use the same after said period of two years, then forever thereafter, whether it uses the same or not.

And for the purpose of fixing said payments to be made, it is agreed that the said cost of construction is to be taken and paid at whatever sum may be sworn to in affidavits, by any chief engineer and treasurer of the party of the second part, as correct and as appearing on and from the construction account on the books of said second party, and said cost of maintaining is to be taken and paid at whatever sum may be sworn to in affidavits by the superintendent and treasurer of the party of the second part, and as appearing upon and from the books of said second party. And it is further expressly under-
66 stood, covenanted and agreed that should said party of the first part, its successors or assigns, fail or refuse to make the said payments or either of them, or any part thereof on demand at any time after the same or either of them becomes due or payable as aforesaid, and as often as the same may occur, and for sixty days after such demand, then all the rights, privileges, franchises, powers, immunities, improvements and property of said party of the first part, in through or upon said Forest Park, and in, into, although, over or upon said tunnel and cut shall become, by virtue and force of said failure and refusal, without further process or proceedings, forfeited and belong to the party of the second part, its successors and assigns; and in case of such forfeiture no further payments, as above provided, are to be made by the party of the first part, but the party of the second part may and hereby is fully authorized and empowered to at once enter upon the sole and absolute possession and enjoyment of all said rights, privileges, franchises, powers, immunities improvements and property to the exclusion of said party of the first part, its successors and assigns and said party of the first part hereby further covenants and agrees for itself, it successors and assigns, upon its failure to pay as aforesaid,

that it (said first party) shall and will by a good and sufficient deed convey all said rights, privileges, franchises, powers, immunities, improvements and property to said party of the second part, its successors and assigns.

It is further covenanted and agreed that the party of the first part may, within said period of two years from the delivery of these presents, lay a third rail for a narrow gauge
67 track through said park, tunnel and cut, provided the same be done in a manner not to interfere with running of trains or operation of the road as it requires by the party of the second part. And provided further, that whether it lays a third rail or not the party of the first part is to make payment for construction and maintaining of said road and road bed as herein-above provided.

In testimony whereof, the said parties hereto have caused these presents to be executed by their respective presidents, and attested by their respective corporate seals, with the signature of their respective secretaries, the day and year first above mentioned.

THE ST. LOUIS COUNTY RAILROAD CO.
By Joseph Brown, President.

Attest. H. R. Briggs, Secretary.
(Seal)

ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY CO.
By B. W. Lewis, Jr., President.

(Seal) Attest: James F. How, Secretary.

68 State of Missouri,
City of St. Louis—ss.

I, Daniel O'C. Tracy, Register of the City of St. Louis, hereby certify that the above and foregoing is a true and perfect copy of the original on file in my office.

In witness whereof, I have hereunto set my hand and affix the seal of the City of Saint Louis, this ninth day of July, 1886.

DANIEL O'C. TRACY, Register.
Per H. Woods, Deputy.

United States of America,
Eastern District of Missouri—ss.

In the Circuit Court of the United States, in and for said District.

Be it Remembered, That on the 12th day of July, A. D. 1886, the following among other proceedings were had, and appear of record in said Court, to-wit:

At Chambers, before the Honorable David J. Brewer, Circuit Judge, at Leavenworth, Kansas, July 12th, 1886.

Central Trust Co. of N. Y. et al., Complainants,
2357 & 2464 vs.
Wabash, St. Louis and Pacific Ry. Co. et al., Defendants.

(Consolidated.)

69 In re intervening petition of city of St. Louis, and St. Louis Kansas City and Colorado Railroad Company.

It is ordered that the intervenors herein have leave to file the bill herein; that the same be referred to Edmund T. Allen, Special Master, with instructions to make his report thereon, on or before the 24th instant, in which report he shall set forth the facts as well as his conclusions of the law on the bill, and also report a sum that would be a fair and equitable compensation for the use of right of way and tracks of the Wabash, St. Louis and Pacific Railway Company, as prayed for in the bill of complaint, and also the rules and regulations under which said use shall be enjoyed by said complainant railroad if said use shall be given.

And it is further ordered that the further hearing of this complaint be continued until the 26th instant, at 11 o'clock a. m., at Chambers in the city of Leavenworth, Kansas, and that complainants serve a copy of this order on the Receivers of the said Wabash, St. Louis and Pacific Railway Company, or their solicitor, Wells H. Blodgett, Esq., within three days from this date.

July 12, 1886. (Signed,) DAVID J. BREWER,
Circuit Judge.

70 United States of America,
Eastern District of Missouri—ss.

In the Circuit Court of the United States, in and for said District.

Be it Remembered, That on the 13th day of July, A. D. 1886, the following among other proceedings were had, and appear of record in said court, to-wit:

At Chambers, before the Honorable David J. Brewer, Circuit Judge, at Leavenworth, Kansas, July 13, 1886.

Central Trust Co. of N. Y. et al., Complainants,
2357 & 2464 vs.
Wabash, St. Louis and Pacific Ry. Co. et al., Defendants.
(Consolidated.)

In re-intervening petition of city of St. Louis, and St. Louis, Kansas City and Colorado Railroad Company.

It is ordered, that George H. Shields, Esq., be and he is hereby appointed Special Master herein, to be substituted in place and stead of Edmund T. Allen, Esq.

71 In the United States Circuit Court, Eastern District of Missouri.

City of St. Louis, St. Louis, Kansas City & Colorado R. O. Intervenors in Central Trust Co., of N. Y., Complainants,
Nos. 2357 and 2464. vs. In Equity.
Wabash, St. Louis and Pacific R. R. et al., Respondents.
Consolidated cause.

The above entitled petition having been referred to me as Special Master pro hac vice, I, George H. Shields, do solemnly swear that I will obey the constitution of the United States, and will faithfully discharge my duties as Special Master therein, according to the best of my ability, so help me God.

GEO. H. SHIELDS.

Subscribed and sworn to before me this 14th day of July, 1886.

(Seal) A. P. SELBY, Clerk.

72 United States of America,
Eastern District of Missouri—ss.

I, A. P. Selby, Clerk of the Circuit Court of the United States, in and for the Eastern District of Missouri, do hereby certify the writing hereto attached, to be a true copy of order referring intervening petition of city of St. Louis et al., to E. T. Allen, and also copy of order substituting Geo. H. Shields in place and stead of Allen as Special Master, in case No. 2357 and 2464 of Central Trust Co., of New York et al., plaintiffs, against Wabash, St. Louis & Pacific R'y. Co. et al., defendants, as fully as the same remain on file and of record in said case in my office.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Court at office in the city of St. Louis, in said district this 14th day of July, in the year of our Lord eighteen hundred and eighty-six.

(Seal)

A. P. SELBY,
Clerk of said Court.

73 In the Circuit Court of the United States, for the Eastern District of Missouri.

The City of St. Louis, St. Louis, Kansas City & Colorado R. R. Co., et al., Intervenors in Central Trust Company of N. Y., Complainants,
Nos 2357 and 2464. vs. In Equity.
Wabash, St. Louis and Pacific R. R. Company, et al., Defendants.

Consolidated Cause.

The petition and exhibits in this case, together with the order of reference, having been delivered to George H. Shields, Special Master herein, by Mr. A. P. Selby, the Clerk of the Circuit Court of the United States for the Eastern District of Missouri, on July 14th, 1886, warrants for hearing were issued to the solicitors for the respective parties interested, and the case set down for hearing in the United States Circuit Court room in the Custom House, in the City of St. Louis, at ten o'clock a. m., on July 15th, 1886, at which time there were present as follows: The Master, John C. Orrick, and D. P. Dyer, representing the intervenors; and Wells H. Blodgett, Warwick Hough and Mr. Priest, representing the receivers, when the following proceedings were had:

74 Master: I desire to make this statement to the gentlemen present—Two or three days ago Mr. E. T. Allen came to me, showing me the order of reference in this case, and asking me if I knew anything about the matter or had any connection with it. I replied no. He then asked me if I would serve as Master if it was satisfactory to Judge Brewer. Some conversation passed about the length of time it would take, because I expected to go East pretty soon. The result was that I said if it was satisfactory to Judge Brewer I would accept the appointment. Mr. Allen said he would telegraph to Judge Brewer, and Judge Brewer made the order appointing me in Mr. Allen's place as Master pro hac vice. Yesterday Col. Blodgett came to me and said he was informed that I had been of counsel in matters connected with the St. Louis County Railroad Company. I said I had no recollection of it, but that since he mentioned it I remembered that Henderson and Shields had been of counsel for some of the parties interested in the St. Louis County Railroad Company as stockholders and directors, regarding some controversy between themselves. In that controversy Henderson and Shields represented James O. Broadhead, Joseph Brown and F. C. Sharp's estate. I went to the State Circuit Clerk's office this morning, to inform myself thoroughly in regard to those cases. They had escaped my memory entirely until Col. Blodgett spoke to

me about it. I found there were three cases in which Henderson and Shields were counsel. One of the cases was a suit of Sutton in behalf of the stockholders of the St. Louis County Railroad Company against Broadhead, Brown and Sharp's estate and others, claiming that the directors of the railroad company had organized a construction company to build
75 said railroad for the purpose of defrauding the other stockholders of their interests in said road, and that they illegally obtained a majority of the railroad company's stock, and with it controlled the Board of Directors of the company, in fraud of the rights of the other stockholders, and that they had sold the property of the railroad company to the St. Louis, Kansas City and Northern Railroad Company for $125,000.00, which they fraudulently retained for their own use, instead of dividing it among the stockholders, and asked an accounting and payment of the money to the company for the benefit of the stockholders and general relief. Henderson and Shields were connected with this case before it was disposed of, and I remember to have taken some depositions in the matter. The plaintiffs were non-suited on the 22d day of February, 1877. Another case was that of Amos H. Shultz, on behalf of the stockholders of the St. Louis County Railroad Company against Broadhead, Brown and Sharp's estate, claiming that they legally came into possession of 419 shares of stock of the St. Louis County Railroad Company. That an election was about to be held, and it was claimed that if defendants voted that stock they would control the Board of Directors of the company, and thereby be enabled to misappropriate and misapply the funds, which they intended to do. An injunction was granted against voting the stock at the election. Henderson and Shields appeared for the defendants. The case was subsequently dismissed at the plaintiff's cost on the 27th day of January, 1877. Subsequently, at the February Term, 1877, Herman A. Hauessler and Sallie A. Sharp, as administrators of F. C. Sharp, brought suit against
76 the St. Louis County Railroad Company, Rufus J. Lackland and Gerard B. Allen as trustee, and others alleged to be owners of certain bonds issued by said company to foreclose a mortgage made by said company on its property and franchises on the 5th day of October, 1875, and to prevent the railroad company from disposing of other bonds of the same issue, which had not been negotiated. Henderson and Shields represented the plaintiff in this suit. It was dismissed by plaintiffs on the 2d day of April, 1877: My recollection is that none of these suits were ever tried, but the matter was amicably settled between the parties. I have the papers and the copies of the petitions in these cases here, so that you can examine them. I have no recollection of ever being connected

in any way with any other matters growing out of the St. Louis County Railroad. If I had remembered these cases at the time Mr. Allen came to me I should probably have declined to accept the position, for the reason that I think that if there ever was a subject on which the Apostolic injunction, to "avoid even the appearance of evil," applies, it is in judicial matters. These suits all involve controversies between the construction company and the stockholders of the St. Louis County Railroad Company, and between the directors and individuals of these two corporations. How far these questions will be involved in this hearing you, gentlemen, must determine for yourselves. I think it is due to you gentlemen, and to myself that I should make this statement. I feel that if any of the questions involved in these old cases are likely to arise in the pending matter, that I should not hear the case, and will telegraph to Judge Brewer to appoint some one else.

77 Col. Blodgett: We have no objection on our part to your having the case.

Mr. Orrick: We have no objection on the part of the intervenors.

Master: Then I understand that all parties consent that I shall sit in the case, notwithstanding my having been connected with these other matters.

Mr. Orrick: None of those questions you mentioned can possibly come up in this case.

Master: I have had warrants for the hearing of this case this morning served on Mr. Bell, Messrs. Dyer, Lee & Ellis, Messrs. Noble & Orrick, and Messrs. Phillips & Stewart. I sent notices also to Mr. Henry T. Kent's office, but was informed he was absent in Europe. I then telegraphed to Messrs. Green, Burnett & Humphreys, at Springfield, Ills., that the hearing would take place this morning. The notice is necessarily short, as the Master is compelled to file his report on the 24th inst. The order seems to require or contemplate a notice only to the solicitors for the receivers, and you, gentlemen, who represent the plaintiffs must take the responsibility of proceeding now, or of giving further notice to the attorneys for the railroad company.

Mr. Orrick: We know that the receiver's counsel got notice; that is all that is necessary.

Mr. Blodgett: We want to reserve the right to file an answer by tomorrow morning, if we should think it necessary.

Mr. Orrick: I don't know that we object, have any objections to their filing an answer.

Master: I shall permit them to file an answer on or before ten o'clock to-morrow morning, in order to know what
78 the issues are. I understand this proceeding to be for the purpose of information to the Circuit Judge as to the facts and law arising in the matter upon which he will frame his own order in the case, and that either party has a right to present any facts or propositions of law arising in this controversy.

We will now adjourn till to-morrow morning at ten o'clock.

Pursuant to adjournment, as above stated, on July 16th, 1886, the hearing of the case was resumed.

Present: John C. Orrick, Esq., and D. P. Dyer, Esq., solicitors for the Intervenor; John W. Phillips, Esq., solicitor for the Central Trust Company of New York and James Cheney, trustees; and W. H. Blodgett, Esq., Warwick Hough, Esq., and H. S. Priest, Esq., solicitors for the Receivers.

Counsel for the Receivers state that they have concluded they will not file an answer in the case.

Counsel for the Intervenor offered in evidence Exhibit "A" to the bill, being a certified copy of an agreement between the St. Louis County Railroad Company and the St. Louis, Kansas City and Northern Railway Company, dated August 11th, 1875, and states that the plat called Chart A in the agreement is the same as the plat now shown to the Master, which it is agreed may be used in lieu thereof; that the property marked blue on the plat is the right-of-way sold by the St. Louis County Railroad Company to the St. Louis, Kansas City and Northern Railway Company by the deed of August 11th, 1875, and also indicates the line of the St. Louis County Railroad through the park, to which the contract of August 11th, 1875, refers.

79 Counsel for the Receivers admit that the right-of-way through the park, as fixed by the tripartite agreement, is forty-two feet, the St. Louis County Railroad having originally seventy feet and leasing twenty-eight feet by a contract.

Counsel for the Intervenor offers in evidence a certified copy of the contract between the Commissioners of Forest Park and the St. Louis County Railroad and the St. Louis, Kansas City and Northern Railway Company, being a tripartite agreement dated August 11, 1875, and recorded September 5th, 1879, in the Recorder's office of the city of St. Louis, in Book 620, p. 8, together with the exhibit attached thereto, being a plat showing

the grades as agreed upon in the tripartite agreement attached to the contract marked Exhibit B. to the bill.

(Insert.)

Counsel for the Intervenor offers in evidence the Acts of the Legislature mentioned in the bill, with the agreement that they may be read from the Session Acts of the State and also the Scheme and Charter, with the agreement that it may be read from the Statutes.

Counsel for the Receivers admit that the whole of Forest Park is in the city limits of the City of St. Louis, and is administered, and has been since about the year 1876, by the Park Commissioner, as a part of the city government.

Counsel for the Receivers admit that the allegation of the petition with respect to the acquisition by the Wabash, St. Louis & Pacific Railway Company of the property of the St. Louis, Kansas City & Northern Railway Company is true, and that it was acquired on November 11th, 1879.

80 It is admitted that the dotted lines on Chart A indicate the line of road of the Wabash, St. Louis & Pacific Railway Company as at present constructed, and substantially as constructed in 1875 and 1876.

Counsel for the Receivers admit that the right-of-way through the park is forty-two feet in width, and that the strip in blue acquired from the St. Louis County Railroad east of the park is thirty feet in width as a rule.

S. T. Emerson, sworn for the intervenor, testifies as follows:

Direct Examination

By Mr. Orrick:

Q. What is your business? A. Civil engineer.

Q. How long have you been a civil engineer?

A. Thirty-six years.

Q. Please state in your experience what you have done in connection with railroads?

A. I have had a continuous experience for thirty-four of the thirty-six years; in operation some of the time, and the balance of the time, construction.

Q. Have you ever operated railroads?

A. As operating engineer.

Q. Were you at any time chief engineer of the St. Louis, Kansas City & Northern Railroad Company? A. I was.

Q. When? A. From 1870 to 1879.

Q. What connection, if any, did you have with the construction of the branch railway of the St. Louis, Kansas City and

Northern Railroad from Ferguson through Forest Park to Eighteenth street?

81 A. I was chief engineer of the road at the time and had charge of the construction of that branch.

Q. How long is that branch? A. A trifle over eleven miles.

Q. Do you know what it cost to build it?

A. It cost about $840,000.00.

Q. Did that include the right of way and everything?

A. The total cost.

Q. Will you state what the cost of that portion of the road was from Eighteenth street or the Union Depot to the north line of the park? A. $360,000.00.

Q. Where it enters the park?

A. Where it leaves the park going west.

By the Master:

Q. That includes through the park? A. Yes sir.

By Mr. Orrick:

Q. The Union Depot grounds come to the west side of Eighteenth street? A. I believe they do.

Q. Or Papin street?

A. I believe they do; our road terminated at the west side of Eighteenth street.

Q. That is where the western limits of the Union Depot grounds end?

A. I suppose it is; I don't know positively. That is the information I have.

Q. You superintended the work of construction between the Union Depot, the north line of the park and Ferguson?

A. Yes sir.

Q. It was done under your immediate supervision?

A. It was.

Q. I understood you to say that $360,000.00 was the total cost, including what was paid the St. Louis County Railroad?

A. Yes sir.

Q. Did you build this road on the line of the St. Louis

82 County Railroad east of the park? A. Yes sir.

Q. To Eighteenth street?

A. We did on their located line.

Q. How wide was that right of way, do you remember?

A. Thirty feet.

Q. That is east of the park?

A. That is east of the park.

Q. Do you remember what it was in the park?

A. I don't know about the park.

Q. Did the St. Louis, Kansas City & Northern Railroad pay for the whole of the construction in Forest park?

A. They did not pay for the masonry. They paid something

toward the Boulevard bridge, either one half or something about that.

Q. Who built the bridge at the entrance, where you go under the large bridge?

A. The Forest Park Commissioners.

Q. They did also the stone work through the tunnel?

A. All the stone work; there are two culverts and a viaduct.

Q. That was all paid for by the Forest Park Commissioners?

A. All except the Boulevard bridge; I don't remember what proportion they paid.

Q. Do you remember how much the Board contributed in dollars about?

A. No sir; I say the Forest Park Commissioners paid for all the masonry in the park except a portion of the Boulevard bridge; I don't know what share was paid towards that; I think one half.

Q. Can you give the Master without stating the figures whether it was a considerable sum paid by the Forest Park Commissioners?

A. Yes sir, is was a considerable sum. It was good
83 masonry, good work, and cost considerable money.

Q. Several thousand dollars? A. Yes sir.

Q. Now this work that was done and paid for by the Board of Forest Park Commissioners, please state whether that work was a necessary part of the construction of the road, or whether it was used by the railroad as a part of it?

A. In making up the cost of that portion of the line?

Q. I mean this; I refer to the money paid for masonry. Please state what connection that masonry had with the construction of the road; whether it was necessary and proper for the railroad to have it?

A. It was necessary, but a little extravagant. The company, if they had had to pay for it themselves, might have gotten along a little cheaper.

Q. Suppose the Park Commissioners had not done it, who would have done it in order to complete the railroad?

The counsel for the receivers object to this testimony as irrelevant.

Objection overruled by the Master.

By Mr. Orrick:

Q. How many tracks, if any, are on the right of way where the Wabash Railway now enters the park from Eighteenth street, the thirty feet from Eighteenth street to the park and the forty-two feet through the park?

A. There are occasional places where there is a sidetrack; there could not be but one track besides the main track on the thirty feet.

Q. In the main it is a single track?

A. A single track road.

Q. Where is that track located with reference to the
84 right of way? A. The main track.

Q. Yes sir; in the center of the thirty feet?

A. I could not say where it is exactly; whether it is the center or not.

Q. About?

A. It is in the thirty feet, but I cannot tell without a measurement.

Q. What kind of iron or steel did you put down there?

A. I think it was fifty-six pound steel.

Q. Is it there yet?

A. On this side of the park the original steel is there, in my opinion.

Q. How about through the park?

A. Through the park there is heavier steel; I think they have put new steel there, sixty pound steel.

Q. Have you examined the track recently? A. Yes sir.

Q. When? A. During this week.

Q. How did you examine it? A. I walked over it.

Q. Please state to the Master, if you can, what the value of that track is, laid as now; I mean, by that, the ties, iron and other material in the track; in other words, what the track as it stands, irrespective of the real estate on which it is located, is worth?

A. The steel is badly worn; the ties are old, and rotten; the ties are in very poor condition. I should think the value of the track as it now stands would be about fifty per cent; depreciated about fifty per cent.

Q. Depreciated about fifty per cent?

A. Yes sir; the ties more than that; take it altogether, I should take it that way. It is rather a poor track.

Q. Do you know what the ties when laid cost as new ties, as laid in the track; what they were worth?

A. Thirty-eight cents apiece.

85 Q. How about that steel in 1875 and 1876?

A. I am not sure what it was worth then; I think $80.00 a ton.

Q. What is steel worth now?

A. $37.50; that is what we are buying it for.

Q. Can you give me the exact distance between the end of the Wabash track at Eighteenth Street and the north line of Forest Park where the Wabash enters the park?

A. It is a trifle over four miles. Four miles and some two hundred and twenty feet.

Q. Have you made any estimate in round numbers of the difference in money between the cost of those ties the track as originally laid, and the present value, between the north line of the Park and Eighteenth Street?

A. The cost of the ties only?

Q. No, between the value of the track as it is now, and its cost in the first instance, between Eighteenth Street and the north line of the Park; give me the difference in value in round numbers? A. Yes sir; I think about $25,000.00.

Q. Which way? A. Below.

Q. It is $25,000.00 less than it cost? A. Yes sir.

Q. What did the track cost per mile when laid in 1875 and 1876; I mean the track irrespective of the right-of-way or embankment; simply the track, by which I mean the ties, spikes, iron and splices laid? A. About $40,000.00.

Q. As laid? A. As originally laid.

Q. I understand you to say the track cost $40,000.00?

A. The superstructure; the track, ties, spikes and splices.

Q. And there is a depreciation of fifty per cent?

A. Easy.

86 Q. Is there any stone ballast on the track?

A. Yes sir.

Q. How much?

A. It struck me there was about 1700 or 1800 yards to the mile; it would take about that for a foot of ballast; I think that is what they put on.

Q. Please describe to the court this cut and tunnel through the park towards the east part of the park; what is its depth, its width, and the character of the wall?

A. That boulevard? I did not measure the length of it; I suppose from recollection the length is 300 feet and the width in the clear is twenty-eight feet.

Q. The width in the clear is twenty-eight feet?

A. On the grade line; the walls batter and fall back as they rise.

Q. What is the character of the walls; how high are they, and how deep is the excavation?

A. I did not measure it; I think it is 18 feet above the grade, and probably two feet below. It would be a twenty foot wall.

Q. How wide is the space between the walls at the base of the walls?

A. When I answer that, I speak of my recollection of the agreement made at the time, to be twenty-eight feet wide at grade. I have not measured them for a number of years; not since the construction.

Q. State whether in the cut there is one or two tracks in the park?

A. From the boulevard to the western end there are two tracks; the track extends may be forty feet this side of the boulevard bridge, and there terminates, and the rest is only one track.

Q. Did you notice the condition of the tracks as to whether they are being used or not?

87 A. There was a car standing on one of them; what I would term a side-track. It looked to me as if just thrown there for no purpose whatever except to keep somebody else from laying a track there.

Q. Is there room for any other track there?

A. No room, only for the two in the thirty feet; there is only room for the main track and the side-track. That is all you can get in thirty feet.

By the Master:

Q. You mean by that answer, you can only put one main track on a thirty-foot right-of-way?

A. You can put two main tracks; two tracks.

By Mr. Orrick:

Q. From your experience with railroads, and your connection with them, can you state what the cost of maintaining a mile of railroad per year would be on a road such as the Wabash?

A. A single track railroad will not exceed $600.00 per mile a year.

Q. What do you mean by maintaining or maintenance?

A. I mean keeping up the depreciation of the rails, spikes, splices and ties, and wear and tear.

Q. Is $600.00 a high estimate?

A. It is a high estimate; I see by the late reports of the Chicago and Northwestern it does not spend but $500.00.

Q. Then on four miles and 224 feet, it would be?

A. $2400.00.

Q. I want to state to you a hypothetical case; suppose that one railroad has a right under a contract to use the track of another railroad for a fair and equitable compensation, between certain points, can you tell me what would be a proper

88 basis to arrive at such fair and equitable compensation?

A. Well, I should think it ought to be arrived at in proportion to the use.

Q. Explain to the Master how you would arrive at it?

A. On a wheelage basis.

Q. What would the wheelage basis be on?

A. On the interest of the cost of the property first, and the cost of maintenance.

Q. What do you mean by a wheelage basis?

A. I mean on the proportionate number of cars run over the road by the different railroads using it. Take the total number

of cars used on it, and get the percentage; for example, suppose the road (used) is worth $100,000.00.

Q. Take the interest at what rate? A. Six per cent.

Q. On that amount? A. Yes, sir.

Q. That is $6,000? A. Yes, sir; $6,000.00.

Q. How would that $6,000.00, to be paid per annum, be divided between the different roads using the track?

A. In proportion to the number of cars run over the road by each road; for instance, suppose one road runs 500 cars and the other runs only 100, that would be 600.

Q. What proportion of $6,000.00 would each road pay?

A. The road running 100 cars would pay one-sixth of the $6,000.00.

Q. And the road running 500 cars would pay $5,000.00?

A. It would pay five-sixths, or the balance.

Q. How about the maintenance of the road?

A. I should think it would be on the same basis exactly.

Q. State to the Master whether you consider that a fair and equitable mode of arriving at the compensation under such an agreement as that? A. I should.

Q. You are the Chief Engineer of the St. Louis, Kansas City and Colorado Railroad? A. Yes, sir.

89 Q. State to the Master how much railroad they have built, and where it is located?

A. They have got a track laid from Forsyth Junction to beyond Creve Cœur Lake, and a branch this side of the Lake to East Lake, and some track laid in the Pass; taking the whole thing altogether, we have about twenty-one miles of track laid. We have in St. Louis County and Franklin County, some ten miles of completed grade, and a force working on the balance; and we have several miles of completed grade in Kansas, from the city of Fort Scott this way, and the contract let from Fort Scott this way about twenty-five miles. They are now working on it.

Q. How long will it consume to complete the road to Union, with the work you have done?

A. Until sometime in November.

Q. How far will that be?

A. Fifty-four and a half miles.

Q. How about the road between Forsyth Junction and Creve Cœur Lake; [this] that ready for operation now?

A. That is ready.

Q. Where is Forsyth Junction, with reference to the northern line of the Park?

A. A little over 3300 feet west of the west line of Union Avenue.

Q. It is just north of the Park? A. Yes sir.

By the Master:

Q. How far north of the Park?

A. It is about 350 or 400 feet north of the north line of the Park.

By Mr. Orrick:

Q. What is the gauge of the St. Louis, Kansas City and Colorado Railroad? A. Four feet, eight and a half inches.

Q. What is the gauge of the Wabash from the north
90 line of the Park to the depot?

A. Four feet, eight and a half inches.

Q. Then they are the same gauge? A. Yes sir.

Q. Is that road now being operated?

A. It is for construction purposes.

Q. For any other purpose? A. No sir.

Q. Why? A. Because we cannot get into town.

Q. Will you please state the damage if any, this company is suffering by reason of not being able to come in?

A. Well, it is a serious injury to the company.

Q. It is practically hung up out there?

A. Yes sir, shut off.

Q. Please state whether there in an opportunity to do business between Union Depot and Creve Cœur Lake on this line?

A. A very fine chance.

Q. How about this season of the year in particular?

A. At this season of the year in particular, and the wheat is moving in from out there, we are not getting the trade.

Q. How about excursion business to the lake in the summer time?

A. We are losing all that, all that we would get of it.

Q. That is a summer resort? A. Yes sir.

Q. It is about the only one around the city, is it not?

A. I believe it is.

Q. Please state whether the running of the road to the Union Depot would be an accommodation to the public as well?

A. Yes, it would be a great accommodation to the public; parties have made application, several parties out on the Olive Street road and beyond, who are anxious to patronize the road, and get into the city, and get on it to transact business.

91 Q. You have not done that because you cannot get to the depot? A. No sir.

Q. State whether Forsyth Junction, the point to which the road is completed, is within the city limits?

A. Yes, it is within the city limits.

Q. I will ask you whether railroads keep a record of wheelage over their roads?

A. Yes sir, they do; most roads do; I suppose all roads.

Q. Would there be any practical difficulty in keeping a wheelage record here? A. No sir.

Q. Is it an ordinary thing for a railroad to do?

A. They all do it.

Q. How often in your judgment would it be fair to make a settlement on a wheelage basis?

A. I suppose they settle every thirty days; I don't know how often they settle.

Q. Do you think that would be fair?

A. Yes sir; I should not suppose they would settle any oftener; I don't know as they settle as often as that.

Cross Examination

By Col. Blodgett:

Q. You are now the chief engineer of the petitioner in this case? A. Yes sir.

Q. And have charge of the construction of its line of road?

A. I have.

Q. You were chief engineer of the St. Louis, Kansas City and Northern Railroad at the time it constructed this line from Ferguson to the Union Depot? A. Yes sir.

Q. Did you have charge of the construction of the line?

A. Yes sir.

Q. Did you have charge of the matters pertaining to the acquiring of the right of way? A. No sir.

92 Q. Do you know how much the company paid for the right of way it purchased and condemned between the Union Depot and the eastern line of the park?

A. No, I don't know separately.

Q. Do you know how much the right of way from the north line of the park to Ferguson cost? A. No sir.

Q. What did you say was the total cost of the line from Ferguson to the Union Depot? A. $840,000.00.

Q. How much of that amount was for the right of way?

A. I could not detail it.

Q. Can you state from your own knowledge or even approximate the cost of the right of way, or the amount paid by the company on account of the right of way between Forsyth Junction and the Union Depot from your own knowledge?

A. I could only get at[—] in this way; that is to tell about the amount I spent. I suppose the balance was spent for the right of way, attorney's fees and various other costs.

Q. Now, you say the total cost was $840,000.00; will you state to the Master how you ascertained that fact, or how you know?

A. I got that by the figures I had of what I spent, and by consulting and talking with the auditor, as to the balance of the

money that had been expended. I got it up myself as a matter of curiosity, at the time, to know what the line cost.

Q. You say that this St. Louis, Kansas City and Colorado Railroad Company had a line constructed from Forsyth Junction to Creve Cœur Lake? A. Yes sir.

Q. When did your company commence constructing a line actively? A. Sometime in February of this year.

Q. February 1886?

A. Yes sir; that is, laying track. I went to work the first of December last year. We commenced receiving
93 material, and were laying track in the latter part of February, 1886.

Q. And since the latter part of February, 1886, they have constructed the twenty miles?

A. Yes sir; they have laid and graded a great deal beyond.

Q. Was there any part of that line went of Forsythe Junction constructed by any other company? A. Yes sir.

Q. By what company?

A. I don't know. The Forest Park and Central, I understood. I had no connection with it.

Q. It was graded by what was known as the Forest Park and Central? A. Yes sir.

Q. And the St. Louis, Kansas City and Colorado Railroad is its successor in title? A. I suppose it is.

Counsel for the intervenors admit that the intervenor bought the grade and right of way of the Forest Park and Central but did not buy their franchise.

Q. When you say that the cost of the line from Ferguson into Union Depot was $840,000.00 you mean, I suppose, to be understood as saying that that was the amount disbursed up to the time the road was opened?

A. Yes sir; up to the time the road was opened.

Q. And that it does not include the properties acquired afterwards, subsequently, as shown in Chart "A"?

A. I don't know what they have acquired.

Q. It does not include the property since acquired?

A. It was the cost of the road up to about July, 1876.

Q. Soon after it opened?

A. Soon after it was opened.

Q. When was it opened? A. In June, 1876.

Q. And your estimate of the cost comes down to about July? A. Soon after we got it opened.

94 Q. You stated, I believe, that the cost of the materials, the ties, iron, spikes, splices, etc., in the track, from Union Depot to Forsyth Junction was about $40,000.00?

A. It was worth that at that time; I don't know what it cost.

Q. At the time the road was constructed it cost that?

A. The structure value was about $40,000.00.

Q. Now you say the material has deteriorated, has lessened about one-fourth?

A. About one-half; the ties are worse than that.

Q. According to your estimate it would cost about $20,000.00 to make it a first-class road from Union Depot to Forsyth Junction?

A. It would not, because steel is cheaper now than it was then.

Q. What would it cost now to make it a first-class road?

A. You can get your steel at $37.00 instead of $80.00 a ton; that is, about one-half the price, and you can get your ties—

Q. You need not go into detail, but figure it up to make a first-class road of it?

A. You could relay it all new, and make it first-class for $21,000.00. That does not deduct anything for the old steel you could sell; you could have it all new and put in first-class condition for $21,000.00.

By Mr. Orrick:

Q. You say you do not deduct the value of the old steel?

A. No, that would be for sale.

Q. What would that be worth per ton?

A. I don't know; I am not posted on the values.

By Judge Hough:

Q. It would cost $600.00 a mile after that to keep it in repair?

A. Yes sir; immediately after it is built it does not cost $600.00 a year.

95 By Mr. Orrick:

Q. Does that include renewal?

A. Yes sir; to keep it in the same shape you find it.

Q. That $600.00 a year includes renewal of the track?

A. To keep it in the same shape you find it.

Q. And the purchase of new rails if necessary? A. Yes.

By Judge Hough:

Q. That is $5000.00 a mile it would cost to put it in good repair?

A. In first class condition; you would get something out of that for your old material; you could put it in good repair for less than $21,000.00, because you could rebuild it new for that.

By Mr. Orrick:

Q. How much could you put it in good repair for?

A. Deducting the value of the old material? I don't know what the old stuff is worth a ton; it is worth something; there is ninety-four tons to the mile of old rail.

By Judge Hough:

Q. $600.00 a mile now will not put it in good repair?

A. It will keep it as good as it is.

Q. That is not the question; will it put it in good repair?

A. No sir; certainly not.

By Col. Blodgett:

Q. You are the chief engineer of the petitioner?

A. Yes sir.

Q. At what other points is that company constructing a road?

A. From Fort Scott towards Clinton, in a northeasterly direction.

Q. How much road have they in operation out there?

96 A. They have not any; they are grading from Fort Scott this way.

Q. How much have they graded?

A. I have not been there in a month; I should think they had over three miles of grading done at this time, from the amount we have paid.

Q. You have charge of the vouchers?

A. I issue vouchers on the estimates of the engineer there, who makes measurements.

Q. You think by this time they have graded three miles in the State of Kansas? A. Yes, sir.

Q. From Fort Scott in the direction of Clinton in the State of Missouri? A. Yes, sir.

Q. How far is Fort Scott from the Missouri line?

A. Five and a half miles.

Q. Has your company any grading or any railroad in Missouri at any point between the points you have mentioned until they get into Franklin County?

A. We are grading in Franklin and St. Louis Counties, and in Bourbon County, in Kansas. Those are the only counties we are grading in.

Q. The only railroad the company has in operation is in Missouri? A. That is all.

By Mr. Orrick: We have not any in operation; we have the track laid.

By Mr. Blodgett:

Q. Do you know when the company was incorporated?

A. No, sir.

Q. Will you please state to the Master the terminal points and the counties, as near as you can remember, in which it is expected to build the road? A. In Missouri?

97 Q. From where it begins in Kansas?

A. Commencing at St. Louis County, Franklin County, Gasconade, Osage, Maries, Miller, Cole, Morgan, Benton, Henry, St. Clair, Bates and Vernon.

Q. Then what counties in Kansas?

A. I am not so familiar in Kansas; it goes in Bourbon, and then southwest to the southern tier of counties in the State of Kansas, and then directly west through the southern tier of counties.

Q. Do you recollect the names of the towns or counties through which the road is projected through Kansas?

Counsel for the intervenor objects to this as incompetent and irrelevant.

Objection overruled by the Master.

A. From Fort Scott southwest I cannot name the counties without a map.

Q. As chief engineer of this line, I suppose you can inform the Court how much has been expended in grading in the State of Kansas?

A. Well, including the June estimates up to the 1st day of July it is something over $6,000.00 on expenditure in Kansas.

Q. And how much in Missouri?

A. Something over $300,000.00.

Q. Since you commenced in February?

A. That has been expended that I know of; there are other expenses that don't come under my charge; I don't know how much more we have spent; we have spent that anyway.

Q. In constructing the line in Missouri, you have already expended over $300,000.00? A. Yes, sir.

Q. Does that include the acquisition of the right of way or the old grade and right of way of the Forest Park and Central?

A. I had nothing to do with that.

98 Q. The disbursements of which you speak have been made in the construction of the line? A. Yes, sir.

Q. Under your supervision? A. Yes, sir.

Q. Do you know whether any profile map of the intended line through the State of Missouri has been filed in any of the counties through this State?

Counsel for the intervenor objects to the question as immaterial and irrelevant.

A. There has been in St. Louis County and Franklin County, in Missouri, and Bourbon County, in Kansas.

Re-direct Examination

By Mr. Orrick:

Q. Please state whether you are now making your surveys from Union west towards Fort Scott, and whether you have surveying parties out?

A. Yes, the locating party is now out.

Q. How far have you surveyed west of Union?

A. About sixty miles.

Q. Are the surveying parties going on now?

A. Yes sir; they are sixty miles out.

Q. State whether you have made any survey from Bourbon County east? A. To Clinton, Missouri.

Q. What is the distance? A. Sixty-five miles.

Q. This party is going to Clinton from the east?

A. Yes, sir.

Q. How many are in this party? A. Thirteen.

By Judge Hough:

Q. We neglected to inquire whether any surveys have been made, or any location west of Fort Scott, Kansas?

A. Only about ten or twelve miles. We have run a line down there ten or twelve miles.

Q. What kind of a line?

A. A preliminary line.

99 Q. You have made no actual survey of the road bed?

A. We have made no location.

Q. You have made no location of the road to any extent west of Fort Scott, Kansas?

A. We have only located it to the western line of the corporate limits of Fort Scott.

Q. Your line is not located beyond the western limits of Fort Scott? A. No sir.

By Mr. Orrick:

Q. You have been asked about the work done here at this end in Missouri; what has been done in Kansas; please explain why you have been so active at this end?

A. Well, we have been trying to hold our own here; this was the important place to hold, I suppose. I don't know what policy the Board of Directors has; I have acted subject to their orders.

Q. Do you know about the attempt to get the right of way from them?

A. There has been an attempt to get the right of way from us.

Q. Do you know of any proceedings by the Missouri Pacific to get the right of way?

A. Yes sir; there was a trial took place on the ninth of this month.

Q. That made it necessary to put the force here to hold it?
A. There was a very important pass for us to hold, up there a little ways, if we expected to build the road.
Q. After you had men there did the Missouri Pacific attempt to take the right of way? A. Yes sir.
Q. Do you know what the Wabash Company charges the St. Louis, Kansas City and Colorado Company for pulling a car load of iron from the Union Depot to Forsyth Junction, five miles?
A. Not positively; I have heard, but it was so outrage-
100 ous a price, that I could hardly believe it, and I think I must be wrong.
Q. What is your understanding?

Counsel for the Receivers object to the question as immaterial and irrelevant.

Objection sustained by the Master.

Q. Speaking of this track through the park to the Union Depot, did I understand you to say all the rails were in bad condition or whether any are new rails?
A. I don't think any of them are new rails; they are worn rails.
Q. Now, in putting the cost of maintenance at $600.00 a mile, do you mean for the Master to understand it cost $600.00 a mile per year to maintain a track in first class condition?
A. Yes sir.
Q. I mean to spend that per annum after it has been put in first class condition?
A. Yes sir; the first year or so you would not spend that much; I mean the general average through years.
Q. Does that include the cost of renewal?
A. Yes sir; every article that goes into the track.
Q. In what direction does the material come that goes into the road in construction?
A. The material we have received has come from the other side of the river.
Q. The east side? A. Yes sir.
Q. And the most convenient road would be over what road to reach Forsyth Junction?
A. Over the Wabash.
Q. There is no other road?
A. There is no other road.
Q. Now, from that point, Forsyth Junction, to the Union Depot, what is the most or the only practical entrance to the depot from that point? A. The Wabash Railroad.

Andrew McKinley, sworn for the intervenor, testifies as follows:

Direct Examination

By Mr. Orrick:

Q. What was your position in the year 1875 in connection with Forest Park? A. I was President of the park.

Q. You are the same Andrew McKinley who signed the tripartite agreement on the part of the Commissioners of Forest Park?

A. I have not read this through; I suppose it is the same.

Q. You remember the agreement?

A. I remember an agreement.

Q. Will you please inform the Master what amount of money the Board of Forest Park Commissioners contributed to the construction of the St. Louis, Kansas City and Northern Railroad through the park?

A. My recollection is not very distinct but I think about $39,000 or $40,000.

Q. In what was that expended?

A. It was expended in the bridge as it enters the park between the entrance and where it comes out in the park, the main pathway under the bridge is the principal access to the park from Lindell Avenue, and the two culverts, the one on the left hand side as you go to the park and the other on the right hand side intended for foot passengers.

Q. Do you remember how you happened to make that expenditure?

A. Well, at the time that the right of way was granted and that agreement was made we had not decided what we would do with the eastern boulevard of the park. I have not seen that contract from that day to this, from the day it was signed, not read it over at all, but I observed that is was provided

102 that the park might, by its election, either improve or leave open the open cut or improve it at its own cost so far as the eastern end of the park was concerned. It made the other improvements not probably by any contract or instrument, but they made them as a necessity growing out of the improvements of the park. I do not know as there was any contract but there was a contract by which the railroad agreed to pay a part of the Narrow Gauge access to the park a little north or northwest of the principal entrance that passes underneath. The railroad had not acquired any right of way up to the time of this agreement. All of the covenants in that were in consideration of the right of way.

Q. At that time what was the size of Forest Park; how many acres did it contain? A. 1372.

Q. Where does Forest Park lie with reference to the City

of St. Louis, and where did it lie then with reference to the then City of St. Louis?

A. Its northeastern corner corresponded with the north line of Lindell Avenue, and since that time it has been extended fifty feet from King's Highway to Union Avenue, running north of the park, which was given by Mr. Griswold under certain conditions.

Q. At that time prior to the tripartite agreement, had any railroad been constructed through the park?

A. No sir, not through the park as a park.

Q. How many railroads are run through there now, if any?

A. None that I am aware of except the Wabash. I want to explain that the bill creating Forest Park contains, if my memory serves me, this proviso that nothing in this act contained—I have not seen it of late; I put it in myself—

103 shall prevent the St. Louis County Railroad from obtaining a right of way through the park, provided they enter on the eastern side through Duncan's sub-division, running west and passing north of the River Des Peres, shall leave the park at the north line thereof east of Union Avenue. I very often have had occasion to speak of that. I suppose that is very nearly the language of the proviso.

Q. What was the policy of the board with reference to railroads passing through the Park at this time, at the time of the execution of the tripartite agreement?

A. There was a great deal of discussion, and there was quite a controversy about where the road should run under the provision which I have mentioned, and it lasted several weeks probably; there was almost a daily meeting on that account. Mr. Sharp, I think, conducted the controversy, so to speak, between the parties on the one side as the representatives of the St. Louis County Railroad Company, and Gov. Reynolds on the side of the park.

Q. Was there any discussion about other roads using the right of way at the time of the tripartite agreement?

Counsel for the receivers object to the question; objection sustained.

Q. Please describe the Park to the Master, whether it has been improved, and if so, how, in a general way?

A. The provisions contained in the proviso that I have just spoken of, were intended to protect the Park against the invasion of all railroads unquestionably, I put it there myself.

Q. What effect would the invasion of the Park by railrouds have upon the Park for the purpose for which it was

104 established?

A. I think a very damaging effect upon the Park, upon the point of use and the point of landscaping.

Q. For what purposes was the park intended to be used principally, as a driving park?

A. It is shown in the act itself to be dedicated to the people of the city and county of St. Louis, for their enjoyment forever; that is a pleasure ground for the people of St. Louis.

Q. Are there drives running through it?

A. Yes, sir; nineteen and three-quarters miles of drives through the park.

Q. What effect would the penetration of the park by railroads at different points have upon the park as a driving park?

A. Up to this time it was apprehended that the road would produce some great danger to persons visiting Forrest Park, and it was a long time before that public impression was relieved, that they were relieved of the apprehension that horses would be frightened, and hence there is a provision that the road shall be covered over with a cover or protected by trees. During the time I was President of the park it was not thought to be necessary.

Q. How much money has been expended in beautifying the park?

A. $405,000 during my administration; since that time nothing. It remains as it was then.

Q. What does it represent in money to-day?

A. In cash paid, $1,300,000, and besides that some contributions made by the city since. The interest on that sum of course is to be added. The bonds are thirty year bonds.

Cross Examination

By Mr. Blodgett:

Q. The money expended by the Park Commissioners
105 was for the payment of the masonry?

A. Yes, sir, and iron work and flooring.

Q. In the viaduct and culvert?

A. Yes, sir; there are two culverts in the park.

Q. One viaduct?

A. Yes, sir; if you call it a viaduct; there is something—an underground bridge where it runs into the bridge at the eastern end, and there is a bridge under which the road, the principal access to the Park, passes.

Q. The carriage road?

A. Yes, sir; there are two pathways which are arches under the principal road.

Q. Now, the expenditures by the Park Commissioners were in the erection of masonry composing these two arches and the principal viaduct, through which the people enter the Park; it was in the masonry composing those structures?

A. Yes, sir; there would have been no necessity for them, except for the railroad.

By Mr. Orrick:

Q. They were made necessary by the railroad?

A. Yes, sir.

By Mr. Blodgett:

Q. They were for the convenience of persons passing in and out of the Park? A. Yes, sir.

Q. Without the railroad there would have been no necessity for the culverts; they were the entrances for carriages and footmen? A. Yes, sir.

Q. The Commissioners did not pay any part of the cost of grading the road?

A. I think there was some little cost of that which grew out of the sloping of the sides. If it was made forty-two feet wide it was paid for by the railroad, but if it was necessary to carry it beyond that it was to be paid for by the Park.

106 Exactly what occurred in that connection I do not remember; Col. Flad will probably be better authority on that subject than I will, although I was there.

Q. And these expenditures were for the purpose of making convenient and safe entrances into the park over the road at one place and under it at another?

A. They were coincident, you know, with the whole work; one depended upon the other. I will say that the railroad company was very considerate in meeting the wishes of the Board, and the Board gave them privileges, as far as practicable, after they acquired the right; but perhaps there was some small expense on the part of the park on the slope. I do not know about that; it certainly is wider than forty-two feet. They intended to furnish space for a double track; they had only the right for one track, and the extension was made for a double track. It was intended to protect the park; it was intended to provide for a contingency to double the capacity of the park—to provide for more trains passing through—and we conceded more ground than was necessary for them—gave them a right of forty-two feet. They had only the right, under the act, to one single passway. It is not named in the act, if you will observe.

By Mr. Hough:

Q. This road, I understand, was completed in 1875 or the spring of 1876 through the park? A. Yes, sir.

Q. That was before the adoption of the Scheme and Charter? A. Yes, sir.

Q. Before the City of St. Louis had anything to do with the park?

A. Yes, sir; the park was not surrendered to the city, I think, until November, 1877.

Q. It was not judicially determined for some time?

107 A. November, 1877. I was President of the park for three years; I remember that.

By Mr. Blodgett:

Q. You say that at the eastern end of the park the railroad enters there? A. At Duncan's sub-division.

Q. Through the tunnel?

A. It was intended for a tunnel, but for the accommodation of the road it was made a bridge.

Q. The railroad enters through a deep cut that is bridged over? A. Yes, sir.

Q. It was mutually arranged between the Park Commissioners and the Railroad Company, was it not, that they should fix the grade of the road at that point as it now is?

A. Yes, sir.

Q. And that in consideration of that the Park Commissioners should contribute something towards the structure?

A. Yes, sir; that was the arrangement, but not exactly in that view. It became a necessity after the excavation was made which suited all the parties—it became a necessity to construct the bridge.

Q. And the expenditures by the Commissioners were in the construction of the bridge?

A. Yes, sir; but in consequence of the way the road run in—the point they selected.

Q. The point as agreed on by the Park Commissioners and the railroad? A. Yes, sir.

Q. And the grade was arrived at?

A. Yes, sir; all the points in issue were settled by the contract.

Q. And they went on, then west and north, or in a northwesterly direction from the point where the road enters the park, and it became necessary to construct the line on an embankment? A. Yes, sir.

108 Q. And then the plan contemplated an embankment and a carriageway underneath the railroad track?

A. Yes, sir.

Q. And it was for that purpose of having a carriage way, a neat looking structure there, that the Park Commissioners made the expenditure? A. Yes sir, that was the motive.

Q. At some intermediate point a foot-way or arch was provided under the track?

A. It was supposed there would be passages under the road, and where necessary they were provided for by the park except the contribution made by the Wabash road at the point on the map indicated by the Narrow Gauge Railroad depot. If you will look at the map you will see it is there.

Q. It was the cost of the passage way over and under the

track towards which the Park Commissioners made the contribution? A. Yes sir.

Re-direct Examination

By Mr. Orrick:

Q. I understood you to say that the construction of this road made these expenditures necessary by the Board?

A. Yes sir.

Q. There is a deep cut towards the eastern end of the park, and this cut was walled straight up on each side for several hundred feet?

A. Several hundred feet in length, about twenty-five feet high.

Q. And between those walls is the track of the road?

A. A double track at that point.

Q. Who paid for those walls? A. The Park Board.

By Mr. Blodgett:

Q. Not outside of the park? A. Inside of the park.

By Mr. Orrick:

Q. Now, as to the entrance of the park, the arch under
109 the bridge, I understand you to say the Park Commissioners built that bridge? A. Yes sir.

Q. And the road is now running over that bridge?

A. Yes sir; it cost $17,000.

Q. The main entrance of the park is right under that bridge that cost $17,000 you say? A. Yes sir.

Q. Now, if the railroad had not been constructed, would it have been necessary to have built the bridge at that place?

A. At the time the agreement was made, it was not known what would be the policy of the road in complying with the contract.

Q. Irrespective of any railroad in the park, would it have been necessary for the park to have built the bridge at that place? A. At the entrance; no sir.

Q. It is entirely level ground?

A. Just a slope into the park.

By Mr. Blodgett:

Q. Do you recollect who owned that part of the park, from whom you acquired that part of the park through which the road is constructed?

A. It belonged to the representatives originally of Glasgow. It passed into the owners of the lots known as Donahoe and Gast, the owners of the property then known as Duncan's subdivision, and was then divided into lots. The property beyond that running through the park belonged to W. D. Griswold all the way from where it entered to where it left the park. There was a little piece of property there which the railroad passes

through that belonged to Robert, John or Levin Baker, a few acres, on which there was an apple orchard. Before it reached the park it passed through Duncan's sub-division, and then it entered property that belonged to the Lindell heirs,
110 the Bakers, with a little house on it, and then when it left that it went through the Griswold property. Griswold had fifty acres there.

J. B. Vandyne, sworn for the intervenor, testified as follows:

Direct Examination

By Mr. Orrick:

Q. Where do you live? A. At Sedalia, Missouri.

Q. What is your age? A. Fifty-four.

Q. Please state what connection you have had, if any, with railroads or the operation thereof?

A. I have been in the business since 1855.

Q. What position have you had in connection with railroads?

A. I was—in 1861, I think, and since then I have been superintendent.

Q. I believe you were at one time superintendent of the Union Depot in the city of St. Louis? A. Yes sir.

Q. Suppose there is a contract by which one railroad has agreed to let the cars of another pass over its tracks for a fair and equitable compensation, on what basis or how would the amount of such fair and equitable compensation be arrived at?

A. The wheelage basis is the one ordinarily selected.

Q. What do you mean by wheelage basis, how would you arrive at the amount of that basis, what would you do first?

A. I would take the cost of the road.

Q. Between the points to be used? A. Yes sir.

Q. What would you do next?

A. Take the maintenance of the way, the superintendence, etc.

Q. Suppose you had arrived at the cost, what would you do next in order to arrive at the cost per annum?

A. I would keep a correct account of the number of cars and engines passing over it.

111 Q. Railroads usually do that? A. Yes sir.

Q. How would you arrive at the gross amount per annum that ought to be paid?

A. Take the number of cars and engines each road would run over it, and then divide the sum of expenses and interest account by the numbers of cars and engines the roads handle, and then having a separate statement of each road we could allot each its proportion to pay.

Q. What rate of interest would be fair and equitable on the cost of the road?

A. Whatever their bonds generally run six or seven per cent.

Q. Do you know about what the cost of maintenance per mile would be per year on such a piece of road as that between Forest Park and the Union Depot?

A. I am not familiar with the track.

Q. Suppose it is an average track?

A. I should think one section gang, six or seven men, would keep it in repair; about $200 a month for wages.

Q. How many miles of road does one gang of men take care of?

A. Out on the line five or six men to a section of six miles.

Q. Can you state what the cost of maintenance per annum would be, taking one year with another, including labor and everything; I mean the cost of maintenance of the track?

A. This piece of road I am not familiar with; but starting new, there would be very little expense.

Q. A new road; how much would it be?

A. I should say $20 or $25 a mile would be sufficient a month.

Q. As the road gets older it would increase?

A. Yes sir.

Q. Give the average through a series of years what it would be?

A. It depreciates as the traffic of course increases on
112 it, it depends on the number of cars you run over it. The life of a tie is about seven years, and the iron would wear out according to the number of engines and cars you hauled over it. The more you handle over it the more men you would require to take care of it.

Q. You would consider $400 or $500 a mile sufficient for renewals through a series of years?

A. Steel rail would have to come out once in ten years, and the ties once in seven years.

Q. I am stating the amount to cover everything, renewals for several years, seven years or ten years as the case may be?

A. It it pretty hard to get at that, $600 or $700 a mile, renewals and all. That is merely a rough guess, I am not familiar with the road at all.

Cross Examination

By Mr. Priest:

Q. Have you any extended experience concerning the use of tracks in the manner specified in Mr. Orrick's question?

A. Yes sir, I have had that to do very often.

Q. At any other point than at St. Louis? A. Yes sir.

Q. In connection with any other road than the tracks belonging to the Union Depot Railroad Company?

A. Yes sir, the Nashville & Decatur and the Missouri Pa-

cific, and the Nashville & Decatur at a junction where they cross a bridge over the Tennessee. The superintendents are required to make out a statement of the wheelage and what the expense would be to the Manager?

Q. Simply for the purpose of keeping their accounts?

A. Yes sir, and setting on the basis that each shall pay for the use of tracks.

Q. At these connections of which you have spoken here the rental was in the sum gross? A. Yes sir.

113 Q. Without reference to wheelage?

A. Yes sir, after they heard our report the amounts were generally cut down by the Manager and made in a lump so much a month without regard to the wheelage afterwards.

Q. The contract with reference to a road depends upon the circumstances and conditions of the contracting parties—there is no general rule or custom or usage in regard to it?

A. It is agreed between the roads always.

Q. It is a matter of contract and not one of usage?

A. They use the wheelage basis to arrive at conclusions so as to come as near as possible to what is right and just.

Q. That is simply a fact they consider in determining the compensation? A. Yes sir.

Q. Or in making a contract, but as a rule is not the contract itself? A. Not always, no sir.

Q. Of course the necessity of repairs depends upon the usage of the track, the condition of the territory through which it passes? A. Yes sir.

Q. The ground on which it is located? Some parts of tracks are more difficult to maintain and more expensive in maintaining than others? A. Yes sir.

Q. You have never examined the track of the Wabash through Forest Park and from there to the City at Eighteenth street? A. Never.

Q. You know nothing about the track?

A. The physical condition I know nothing about.

Q. For the use of the Union Depot tracks at St. Louis, what is the per cent. upon the valuation of the property charged to other roads?

Counsel for the intervenor objects to the question.

A. The Union Depot property is owned by a syndicate
114 of gentlemen, and they charge the roads using the tracks a certain interest, ten per cent.

Q. That is ten per cent on the value of the property, not on the basis of wheelage?

A. Yes sir, the roads are charged with the number of cars they run, and if they are cleaned that is extra, of course.

Q. Where the use of such tracks comprehends the terminal

advantages of a road, those are charged for of course, taken into consideration?

A. You are speaking of the Union Depot passenger department.

Counsel for the intervenor objects to this as irrelevant; objection sustained.

Q. As superintendent of a railway, did you ever conduct to final consummation a contract on the part of one railway company for the joint use of the track of another at a terminal point?

A. No, sir; that is determined by the heads of the roads finally; I have made reports to them. I have never made a contract myself with roads for such privileges, but I have made reports on them frequently for the manager or president, and by the manager or president the contract was made.

By Mr. Orrick:

Q. On what basis?

A. On wheelage, generally, and very often a compromise is made between them so as to make it less, most always.

By Mr. Priest:

Q. Of course you say this matter altogether depends on the circumstances and the situation of the two roads and the amount of track to be used? A. Yes, sir.

Q. And the advantages to be spared by the road using the track proposed to be used by another coming in?

A. The road doing the most business would pay the
115 most expenses, and that would be determined by the number of cars hauled. The train sheets of all roads show that.

Q. The contracts all depend upon the circumstances of the parties making the contract, the necessity of the one to acquire the right-of-way over the track of another, the joint use of the track, and the ability of the company owning the road to spare its track? A. Yes, sir.

Q. It depends on these circumstances?

A. Yes, sir; there are similar cases to the one I referred to a while ago. The Fort Worth road stops four miles short, and goes over the expensive bridge over Trinity river, and of course the cost of the roadbed and everything is made up, all of the expense incurred in building the railroad, bridge and everything, and all the maintenance of way after it is built is divided between the roads according to the number of engines and cars that run over it. That is the general basis on which we run. There is a compromise generally made between the parties at the home office. At Hannibal there is a similar case there, the Wabash use the Missouri Pacific tracks, and we

keep a regular wheelage account of all the cars handled in the yard. One company furnishes two switch engines and the other two, so that the entire expense of the station is allotted according to the terms each company has in the station.

By the Master:

Q. Is that upon the basis of the cost of construction or maintenance?

A. No, it is simply the wheelage basis for handling cars in the yard.

Re-direct Examination

By Mr. Orrick:

Q. You spoke of four miles of track being used in Texas,
116 from where to where?

A. From Ft. Worth to Hodge.

Q. Who uses that four miles?

A. The Fort Worth and Denver.

Q. Who owns the four miles?

A. The T. P. and it is leased by the Missouri Pacific.

Q. Is Fort Worth quite a large place?

A. There are about twenty-five thousand people there.

Q. Now, on what terms does that road use that four miles from Hodge to Fort Worth?

A. I think they pay $500 a month.

Q. Was it any time on a wheelage basis?

A. We tried to get it that way at one time, that is the reason I spoke of having the matter in charge.

Q. What was done?

A. We settled the cost at $1,500 a month, and they compromised it in New York or here, and made it $500 a month.

Q. In the first instance how did you arrive at the $1,500?

A. We took the cost of construction, the right-of-way and everything pertaining to the road, and estimated the number of cars and engines that went over it in a month, took a month, and took the train sheets to see how many cars and engines went over and divided the whole amount of expense and everything by the whole number of cars and engines, and charged them their proportion.

Q. Where there is to be a user of a track on a fair and equitable basis, do you know of any other than a wheelage basis by which you could arrive at it?

A. I see no other way of getting at the true amount that each road should pay.

117 Q. As the wheelage increases the compensation increases? A. Yes sir.

By the Master:

Q. You stated that the basis was the cost of construction and maintenance, and a proper division would be on a wheel-

age basis; you would not consider that a uniform rule as to any portion of a track, would you?

A. I should consider that the rule for the track that the two parties run over.

Q. You would not consider the same basis of cost of construction and maintenance for the four miles running through Forest Park into the Union Depot, or Eighteenth street, at St. Louis, at the end of the track as you would consider four miles of a road that did not have that connection?

A. It is more valuable, I know and must be estimated according to the cost of the road.

Q. And an additional element is the value of the track itself? A. Yes sir, that is what I think.

Charles H. Sharman, sworn for intervenor, testifies as follows:

Direct Examination

By Mr. Orrick:

Q. What is your business?

A. I am superintendent of the Illinois & St. Louis Railroad.

Q. That road is located where? A. In Illinois.

Q. Where does it come in, at East St. Louis?

A. It comes in at East St. Louis, or just south of East St. Louis.

Q. How long is that road?

A. The main line is between Belleville and East St. Louis, about fifteen miles.

Q. Does your company own any tracks in the city of East St. Louis, at the terminus of those roads there—prop-
118 erty and so forth?

A. We have some tracks in East St. Louis.

Q. Covering how much ground?

A. The tracks running in the city of East St. Louis cover about three-quarters of a mile.

Q. How long have you had charge, or been superintendent of, or connected with that road? A. Since January, 1878.

Q. Do you move a good many cars on your road?

A. Yes sir.

Q. You do a large business, I suppose?

A. Principally coal business.

Q. About how many cars per month do you move on your road the year round?

A. We will average probably sixty cars a day; that is, loaded cars.

Q. From your experience in railroad business and transportation, I will ask you whether you can state what would be a fair and equitable compensation to a road for the use of it where there is a contract existing, whereby one railroad may use the right-of-way of another railroad?

Mr. Hough, of counsel for defendant, suggests that counsel for intervenor should show whether the witness is qualified to answer the question.

Q. Well, what do you know about the use of other roads, the termini of rights of way of other roads? Do you know about that and about what persons have been willing to do usually within your knowledge?

A. We were at one time the lessees of the Venice and Carondelet Railway—the company is now the lessee of that railway, and in the operation of that we afford track facilities to other railroads; we do a switching business, move cars
119 for other roads, and we also use a part of the Conlogue track under agreement with the Vandalia line, going into the Relay Depot at East St. Louis.

Q. On what basis are those tracks used?

A. We are now using a portion of the Vandalia track to the Relay Depot, about 600 feet. Do you want me to state what we pay for the use of that?

Q. Yes. A. We pay $125 a month.

Q. How about your own road, how about the use of that, state whether you have made any arrangement, or propose to make any out at Belleville or East St. Louis?

A. We had sort of propositions with roads contemplating using our tracks from Belleville; we have never, however, made any agreement with any road.

Q. What are you willing to do as being fair?

Defendant's counsel objects to the question.

Q. I will not press the question. Now, Mr. Sharman, suppose one road by a contract has the right to use the tracks of another between certain designated points, for a fair equitable compensation; how would you arrive at that amount for the use of such right of way, what would be a fair and equitable mode of arriving at it where the parties could not agree among themselves?

A. What would be a fair compensation for the use of a piece of track?

Q. Yes sir, where the parties could not agree and the basis was to be a fair and equitable basis; how would you arrive at it?

A. There is one mode of arriving at it that strikes me as being fair in regard to the value of the tracks to be used jointly, that is in relation to what it costs, and then agree upon a percentage that should be paid on that, add that amount onto the maintenance of the track, and pro rate that.

120 Q. What would be a fair percentage on the cost?

A. Well, six per cent, I presume; that is the average percentage now.

Q. What proportion would each one pay of that?

A. I should divide that perhaps on the basis of wheelage; that would be fair, I think.

Q. What would be about a fair sum for the maintenance per annum of each mile of track, say, in ordinary condition on a trunk line, say such as the Wabash is, from the north line of the park to the Union Depot?

A. That is a variable quantity; it depends of course on the price of labor and the price of material.

Q. Name an outside figure.

A. I should think it would vary from four to eight hundred dollars per mile.

Q. Per annum?

A. Per annum. On the track labor alone, usually I think it is considered a man to the mile keeps the track in good shape as far as labor is concerned; that depends upon the price of labor. And so with material, the life of a tie is considered to be about seven or eight years, an oak tie, and if it had to be renewed it would depend on the cost price of the material. The life of the rail would depend largely on the amount of the traffic; it would vary with different lines.

By Mr. Dyer:

Q. Let me ask you one question. Suppose that the right existed in the St. Louis, Kansas City & Colorado Railroad Company to run over the line of the Wabash road from the north line of Forest Park to Eighteenth street in this city, and that the two parties the Wabash road on the one hand, and the St. Louis, Kansas City & Colorado upon the other, cannot agree as to a fair and equitable compensation to be paid to the Wabash for the use of its track, and that there is a contract for a fair and equitable compensation to be paid for the use of it; can you suggest to the Court any more equitable way of arriving at that compensation than upon the wheelage basis?

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A. No, I cannot say that I could suggest anything more equitable.

Cross Examination

By Mr. Priest:

Q. To what extent have you had experience as superintendent of railways?

A. I have been in charge of the Illinois and East St. Louis Railroad since January, 1878, and I am now in charge of that road.

Q. Is that all?

A. That is the amount of my connection with this line. I was for a short time in charge of Wells' road in 1876, previous to that.

By Mr. Blodgett:

Q. That is all in St. Louis County, Wells' road?

A. Yes, sir; previous to that my connection with railroads was in the capacity of civil engineer.

By Mr. Priest:

Q. This Illinois and East St. Louis Railroad, what is the extent of that line?

A. Its main line is now to Belleville; it is fifteen miles from East St. Lous to Belleville; we are also the lessees of the Venice and Carondelet Railway, which is about eleven miles long.

Q. Making in all about twenty-six miles of railroad that you have under your charge? A, Yes, sir.

Q. What lines, if any, of railway use jointly with the Illinois and St. Louis any part of its line?

A. The East St. Louis Connecting Railway uses a portion of our line.

Q. How much of it?

A. They use about a mile or a mile and a half of our line.

Q. Is the compensation that you received from the East
122 St. Louis Connecting Railway based upon wheelage?

A. We pro rate the expense, divide the expense of maintaining that portion of the track; it is not on wheelage; it is not practicable to get the wheelage, because we are doing a switching business there and we could not very well keep a wheelage account.

Q. What do they pay—the East St. Louis Connecting Railway?

A. That is part of the terms of the lease of the Venice and Carondelet Belt Railway.

By Mr. Orrick:

Q. Then they have the whole road?

A. Yes, sir; the Venice and Carondelet Railway, and according to the terms of the lease they use jointly with the Illinois and St. Louis Railway a portion of this track at the terminus.

By Mr. Priest:

Q. What do they pay for that?

Counsel for intervenor objects to the question as incompetent.

The Master: I think you asked him what they paid for it, and he said $125 a month.

The Witness: That was in reference to the Conlogue line; we pay another company for that.

By Mr. Priest:

Q. The Illinois and St. Louis Railroad Company has a lease upon a part of the Venice and Carondelet Railway, has it?

A. Yes, sir; it leases the whole of the Venice and Carondelet Railway.

Q. At the time the Illinois and St. Louis Railway Company acquired the lease of the Venice and Carondelet Railway Company, the Venice and Carondelet Railway Company had
123 an agreement with the East St. Louis Connecting Railway?

A. No, sir, that is not it exactly. The Illinois and St. Louis Railway Company really constructed the Venice and Carondelet Railway, and after the construction and operation of that road for a certain length of time they sub-leased the Venice and Carondelet Railway to the East St. Louis Connecting Railway, or the Wiggins Ferry Company, in connection with certain car transfer privileges, and part of the terms of that lease was that they should have the use of certain tracks of the Illinois and St. Louis Railroad at their yard, the terminus.

Q. Was the compensation named?

A. The compensation was fixed in the lease.

Q. What is that compensation?

A. That was included in the whole amount that was paid.

Q. And you say there was no compensation fixed for the use of this part of the track in that lease?

A. No, sir, but there was an agreement in regard to the maintenance of it, how this portion of the joint track should be maintained. That agreement was that each company should pay one-half of the maintenance, of the actual cost of maintenance. It only referred to the maintenance.

Q. Do you know what value was fixed on this use of that right-of-way in estimating the rent to be paid in the lease?

A. There was nothing specified as to the value of that; it was a part of the system; it was the only way they could use the system of tracks; the only way was to use this portion—that is, the Venice and Carondelet Railway joined the Illinois and St. Louis track and some distance (about a mile) from
124 East St. Louis, and consequently the Venice and Carondelet Railway had to use this portion of the Illinois and St. Louis Railway, and that made it the joint track.

By Mr. Hough:

Q. Did this Venice and Carondelet Railway simply connect with the Illinois and St. Louis Railway at this point, or did they, the Venice and Carondelet Railway, own any portion of the right-of-way from the point of connection to the depot?

A. No, sir, that was the Illinois and St. Louis Railway.

Q. Their track? A. Yes, sir.

Q. When they leased the Venice and Carondelet Railway they did not lease this mile with it; it was their only way of getting in, but it was not a part of the lease; they did not lease the mile?

A. Not exactly; they had the privilege of running over that portion of the track.

Q. Was there any estimate made of the value of that privilege? A. No, sir, no estimate at all.

Q. It was included in the lease just as if it were a part of the Venice and Carondelet Railway?

A. Yes, sir, in order to make the Venice and Carondelet Railway complete they had to use a portion of those tracks.

By Mr. Priest:

Q. The Wells' road is the St. Louis Narrow Gauge Railroad?

A. Yes, sir, at that time it was known as the West End Narrow Gauge Railroad.

Q. What is the extent of that road?

A. When I was first connected with it it went to the St. Charles Rock Road; I afterwards constructed it to Normandy, and it was running there when I left it. It is eight miles to Normandy and sixteen miles to Florissant, I believe.

Q. Did it connect with any other railway, or did any other railway use the track of it? A. No sir, not then.

125 Q. I believe you stated that the Illinois & St. Louis Railway Company used six hundred feet of the Vandalia road to make a connection with the Relay Depot at East St. Louis? A. Yes sir.

Q. Do you under that agreement run all your cars and trains over that portion of the Vandalia line?

A. We run all our passenger trains over it.

Q. Only your passenger cars? A. Yes sir.

Q. What do you pay for that six hundred feet?

A. $125 a month.

Q. How many passenger trains have you?

A. Four each way, a day, besides extra trains.

Q. No freight at all? A. No freight.

Re-direct Examination

By Mr. Orrick.

Q. Was there a contract between you and the Vandalia road whereby it had agreed to allow you to use that track for a fair and equitable compensation?

A. The agreement was first made between myself and Mr. Conlogue. It was built by him and afterwards came under the control of the Vandalia. My arrangement with him was based on this cost of maintenance, and that amounted to about thirty dollars per month, the way I figured it.

Q. That is on the wheelage basis? A. Yes sir.
Q. How long did that exist between you and Mr. Conlogue?
A. Until the Vandalia took possession of it.
Q. Now what I ask is, when the Vandalia took possession of it, at that time did you have any contract with the Vandalia line whereby you could compel it to let you use those tracks for a fair and equitable compensation?
126 A. No sir, my agreement with Mr. Conlogue was only a verbal one, we had no written agreement.

By the Master:
Q. What do I understand you to mean by wheelage?
A. Well, the number of cars. For instance, if two roads were using a piece of line jointly, the number of cars that one line ran over that portion in a day, or a specified time, as compared with the number of cars which the other road ran over it in the same time, that would be called wheelage.
Q. Suppose one road owned the track subject to the right of the other road to use it, in arriving at the basis of a reasonable rental for the use of it, what would be the elements that you would take into consideration?
A. I should take the element of the cost of the track, the constructing of that piece of line and the cost of maintaining it to arrive at a fair valuation for the use, and then the relative use that each road put that track to, that, is the amount of traffic that each one ran over that piece of line, would measure the use it was to each.

By Mr. Dyer:
Q. If I understand you right what you say is this: If the track you propose to use cost $100,000, and the cost per year of maintaining it was $5,000, that would make $105,000; then you would add the interest on $100,000 at six per cent, which would be six thousand dollars, to $5,000, the cost per year of maintenance, and that would make $11,000; and then you would divide the $11,000 between the roads using it in proportion to the number of cars of each running over it—is that what you mean? A. Yes sir.
Q. Is there any other way of arriving at it where parties
127 cannot agree among themselves?
A. I know of no fairer way than that.
Q. You would not require a road that used one-tenth to pay as much as one that used the track nine-tenths?
A. No sir.

By Mr. Hough:
Q. Would it be entirely fair to take the cost of construction of the road instead of the value of that road at the time the third party comes in to claim a right to run over it? Ought

not the value of the road instead of the original cost of the road be the criterion or basis of the calculation? For instance, your right of way increased in value very much, you may have had the only possible way of getting into the city, wouldn't those elements enter into the value of the property that the other party was to use?

A. I should think so; to some extent, yes; the right of way now would be perhaps more valuable than ten years ago.

Q. A lot that was worth five dollars a foot then, might be worth one hundred dollars a foot now? A. Possibly, yes.

Q. So that it would be the value of the road at the time the party comes to exercise his right, instead of the original cost of the road? A. I should think so.

By Mr. Dyer:

Q. Suppose at the time the right of way was acquired, the right to run over that line of railway was given by a contract to this company, or any other company, the St. Louis, Kansas & Colorado, call it; suppose at the time that was done, the right to run over it was had; suppose the Wabash Railroad had the use of that road without interference, or without having
128 it used by this company, or any other company, would you say that the correct basis would be in fixing a fair compensation to be paid to the Wabash Railroad, upon the cost of that road or upon the increased value of that road, as it might be now with the land it occupies?

Mr. Hough, of the defendants counsel, objects to the question for the reason that the hypothetical statement contained in it does not conform to the facts; that the petitioner here had no existence when the right of way was acquired, and has been in existence only two years.

Q. Suppose at the time, say in 1876, the Wabash Railroad acquired the right of way through Forest Park and thence on to Eighteenth street in the city of St. Louis, subject to the right of any railroad to run over the line into the city of St. Louis, and suppose that road came into existence last year or two years ago, and demanded to go over the road in pursuance of that original contract, would you fix the basis of compensation on the original cost of that road, the use of which the Wabash had exclusively, or would you fix it upon the increased value of real estate over which that Wabash line run?

A. I should fix it on the original cost.

Q. Why?

A. Under the conditions you have stated I should think that would be the understanding.

By Mr. Hough:

Q. If a railroad should organize for the purpose of availing itself of an agreement on the part of the Wabash that any other railway might use its track—if a railway organizes itself for the purpose of taking advantage of a stipulation ten years after the stipulation is entered into, ought that railroad to have the use of that property on the original cost of it,
129 or on the valuation of it at the time they organized for the purpose, which would be equitable?

A. If I understand the case as put, the Wabash, when it acquired this right entered into an agreement to allow the use of this right of way to another road when the time should come, on the condition that it was granted that right at that time itself, so that whenever the conditions come along to meet the requirements of the contract—I should say it should be based on the cost of the road.

Q. It says any road hereafter organized may have the right to run over the track; when you come to estimate the value of the use of that track, if a railroad company is organized for taking advantage of that stipulation and comes to use the property of the Wabash Company, is not the right that this newly organized company gets to be based on the valuation of the property it seeks to use at the time, rather than what it originally cost the parties?

A. I presume so; if it is considered as going through a new section of country and condemning the right of way, then it would have to pay the increased value of the property.

Q. Ought it not to pay all the value of the property at the time of its organization?

A. If it comes along as a road to condemn property and condemns the property of the Wabash, they would have to take it at its present value.

By Mr. Priest:

Q. Your answer to Col. Dyer's question is based on your construction of the contract?

A. Yes sir, I say if there is a contract to that effect the contract should be carried out. In event there is no contract and the road goes through a new country and seeks to con-
130 demn the right of way, of course the value of it is the present value, not the value of the past.

Counsel for the intervenor offers in evidence a deed made from the St. Louis County Railroad to the St. Louis, Kansas City & Northern Railroad, dated August 11th, 1875, recorded in Book 526, page 324 and following, in the office of the Recorder of Deeds. (Marked "Exhibit C").

(Insert)

Counsel for the Intervenor also offers in connection with the above deed Chart A, which was offered this morning as the plat referred to in the deed.

(Insert)

Counsel for the Receivers admit that the St. Louis County Railroad built no track or railroad between Eighteenth Street and the north line of Forest Park where the Wabash, St. Louis & Pacific Railroad now enters the park from the west; that they never built or operated any railroad at all, and that they failed and refused to pay on demand to the St. Louis, Kansas City & Northern Railway, or to the Wabash, St. Louis & Pacific Railway any part of the cost of the construction of its railroad through the park or elsewhere.

Counsel for the Intervenor also offer in evidence a time card of the Wabash, St. Louis & Pacific Railway entitled, "Wabash, St. Louis & Pacific Railway, Solon Humphreys and Thomas E. Tutt, Receivers. Western Division time-table No. 10. Second edition. For the government and information of employes only. To take effect Sunday, May 30th, 1886, six o'clock A. M.," and same was marked Exhibit D.

131 At this point, the further hearing of the case was adjourned until 10 A. M., July 17th, 1886.

Pursuant to adjournment, as before stated, on July 17th, 1886, the hearing of the case was resumed.

Present: Messrs. Blodgett, Hough and Priest, Solicitors for the Receivers, and Messrs. Orrick and Dyer, solicitors for the Intervenor.

Counsel for the Intervenor offers in evidence the articles of consolidation of the St. Louis, Kansas City & Northern Railway Company, with other companies made on November 11th, 1879, in explanation of the allegation of the bill, in respect to the acquisition of the property of the St. Louis, Kansas City & Northern Railway Company by the Wabash, St. Louis & Pacific Railway Company.

Counsel for the Receivers objects to them as irrelevant and incompetent, they having admitted on yesterday the allegation of the bill referred to.

The Master overrules the objection, stating to Counsel for Receivers that they can withdraw the admission, which they refuse to do and [expect] to the ruling.

(Insert)

S. P. Emerson, recalled for the Intervenor, testifies as follows:

Direct Examination

By Mr. Orrick:

Q. As a railroad man, if the St. Louis, Kansas City & Colorado Railroad uses this right of way, state under what rules and regulations they ought to be subject to in order to practically use it.

A. They ought to be subject to the rules of the Wabash Railway when on their track. They could not have two sets of rules.

132 Q. That is usual in cases of this kind.

A. Yes sir.

Q. Have you examined the time-table of the Wabash road, with a view of ascertaining to what use the tracks between the north line of the Park and Eighteenth street is now put?

A. I have.

Q. At what hour the track is used and how many trains pass over it during the twenty-four hours?

A. Yes, sir, I have.

Q. Please state to the Master whether it is practicable for trains of the St. Louis, Kansas City and Colorado Railroad Company to go over that track between the north line of the Park and Eighteenth street at times, when, according to the time table, the track is not being used by the Wabash or the St. Louis, Keokuk and North Western?

A. There would be no difficulty in it. There would be no conflict.

Q. Will you please explain to the Master how there would be no conflict. Have you a diagram there?

A. I have a diagram, showing the trains of the Wabash railway as they now run by the time card.

Q. Please explain to the Master that diagram?

A. These vertical lines are five-minute lines and these vertical lines are fifteen, thirty, forty-five minute and hour lines these heavy, bleak vertical lines are hour lines, and the intermediate lighter lines are five-minute lines; the horizontal lines are the distances between stations according to a fixed scale.

By the Master:

Q. What are the figures opposite?

A. The distances from the center of the Union Depot to the stations.

Q. In miles and fractions?

A. Miles, tenths and hundredths. The diagonal lines between Union Depot and the point about midway be-
133 tween Forsyth Junction and Rosedale Heights indicate the trains of the Wabash railway, and the dotted lines from the Union Depot to West Lake indicate the trains of the St. Louis, Kansas City and Colorado road. The position of the diagonal lines will show whether our trains interfere with their trains. We propose to leave the Union Depot at six o'clock in the morning and arrive at the Lake at seven. We do not run against or in conflict with any one of their trains, as shown by the diagram.

By Mr. Orrick:

Q. What time will there be between their first train and your first train in the morning according to the present time-table? A. Fifteen minutes.

Q. In the starting time?

A. This train is coming in. They would be nearer together at the other end than at the Union Depot. Here is the first train going out at 8:20 and we leave at six, two hours and twenty minutes ahead of the first train. We arrive at West Lake at seven o'clock in the morning, leaving there at eight to return to St. Louis, arriving at the Union Depot at nine o'clock in the forenoon.

Q. What train have they coming in at that time?

A. There we would miss at Forsyth Junction one of their outgoing trains five minutes. It would pass going west five minutes before we arrived there. That is the nearest conjunction. Then we would leave at 9:30 going west. That is a slow train, a mixed train, and it takes an hour and a half, leaving at 9:30 and arriving at the lake at eleven o'clock. Returning, we would leave the lake at 12:30 and get to the Union Depot at two o'clock in the afternoon.

134 Q. Would that interfere with any of their trains?

A. No, sir. We would then leave the Union Depot going west at three o'clock, arriving at the lake at four p. m. Returning, we would leave the lake at seven o'clock p. m. and arrive at Union Depot at eight.

Q. How many trains a day is that?

A. Three trains each way a day. The lines give the number of trains they have on their time card.

Q. That would be the number of trains the Colorado Company would require? A. For a while.

Q. Would there be opportunity for other trains, according to the present time card of the Wabash road?

A. Yes sir, we could put on a great many trains without interfering at all.

Q. These times of departing from St. Louis and arriving at

St. Louis, that you suggested for the trains on the St. Louis, Kansas City and Colorado Road are not absolutely fixed, as I understand?

A. This is for illustration only. We might want to vary from the time.

Q. You could vary it at other times if deemed advisable?

A. Yes sir. They might change their time card and we should always have to fit our trains to their time card. We could not run counter to their trains. We would have to be governed by their time card.

Q. When they change we would have to change to accommodate the new time table?

A. Those are about the hours I thought would make us the most money, leaving early in the morning.

Q. How many cars, probably, would be contained in the trains that would be run by the St. Louis, Kansas City & Colorado, so far as you can estimate from your knowledge of the business?

135 A. I think our regular passenger trains would have three cars. Of course, we would hope to have more. The more cars we haul the better for us. The train leaving at 9:30 would be a mixed train, and we would haul out all our supplies and it might have twenty-four or thirty cars. We would expect to get out our construction material and any paying freight that might offer itself. That would be a paying train.

Q. The St. Louis, Keokuk & Northwestern runs over this track now?

A. Yes sir, from the Union Depot to St. Peter's.

Q. Do you know under what regulations they operate their trains?

A. I do not know what rules. That is the rule I suppose (referring to the time card).

Q It is impracticable to operate any other way?

A. Yes sir, they must be governed by the Wabash. One or the other must control.

By Mr. Priest:

Q. You do not mean to say that the St. Louis, Keokuk & Northwestern operates its trains over our road?

A. I say they pass the trains over it, they go over it.

By Mr. Orrick:

Q. They run from St. Peter's?

A. They pass from here to St. Peter's and back.

By Mr. Priest:

Q. Is it not a fact that the Wabash receive their cars at St. Peter's and take them over the road?

A. I do not know. I have been on the trains.

Counsel for the intervenor offers the plat produced by the witness, and it is marked Exhibit "E."

Cross Examination

By Mr. Blodgett:

Q. Where does the line of the St. Louis, Kansas City & Colorado Railroad connect with the Wabash?

136 Counsel for the Intervenor objects to this as having been gone into; objection overruled.

A. At a point on the Wabash thirty-three hundred and twenty-five feet west of the west line of Union Avenue.

Q. Then it is 3300 feet west of where the Wabash road emerges from the north line of the park?

A. A little more than that. It is 3325 feet west of the west line of Union Avenue. It would be 3647 feet west of the point where the Wabash emerges from the north line of the park.

Q. Have you any railroad any nearer to the north line of the park than 3600 feet? A. No sir.

Q. Have you any right of way nearer the park than that?

A. Not that I am aware of.

Q. Then, as I understand you, at the present time this petitioner has no railroad connection with the Wabash at the north line of the park? A. It has not.

By Mr. Orrick:

Q. How far is the track from the north line of the park?

A. It is in the neighborhood of four hundred feet, I am guessing at this, I do not know exactly, I think it is four hundred feet north of the north line of the park.

By Mr. Blodgett:

Q. Have you any railroad extending from the terminus down to the park? A. No sir.

By the Master:

Q. Explain the difference between the two distances, 3600 and 400 feet. I understood you to say to Mr. Blodgett you only came within 3600 feet, and to Mr. Orrick four hundred feet.

137 Mr. Blodgett: It is thirty-six hundred feet from Union avenue.

The witness: The point where we connect with the Wabash Railway is 3,647 feet west of where the Wabash Railway goes out of the Park. The Wabash Railway goes out of the Park and turns around and goes parallel with the Park westward quite a long distance, and swings to the right and goes northwest. We connect with it there, 3,647 feet from the Park.

By the Master:

Q. How far does your right-of-way and your track come from the point that Col. Blodgett points out as the place the road leaves the Park? A. 3,647 feet.

Q. You have no track or right-of-way nearer to the point the Wabash enters the Park than 3,600 feet? A. No, sir.

Mr. Orrick: Our line is located there, right at the junction.

By the Master:

[—] What did you mean by your figures, given a moment ago, 400 feet. To what did that refer?

A. He asked me another question, about how far that point was north of the Park, and I gave him that distance. This is the park extending westward, and the line of the railroad runs nearly with the park further on.

Q. Then you have no road, right-of-way, or location of any kind nearer to the point where the Wabash enters the park than 3,647 feet?

A. We have a location, I answered we had no railroad.

By Mr. Hough:

Q. Have you a right-of-way there??

A. I do not attend to the right-of-way.

138 Q. To your knowledge there is no right-of-way?

A. I do not know.

By Mr. Blodgett:

Q. Have you any track? A. No sir.

Q. Have you graded any?

A. No sir, the line is located.

By Mr. Hough:

Q. You made a preliminary survey? A. Yes sir.

Q. And located the route? A. Yes sir.

Q. You do not know of any right of way there?

A. I do not know about that.

By the Master:

Q. What point is West Lake on this plat, marked Exhibit E?

A. That is Creve Coeur Lake; it is between the lakes.

Counsel for the Intervenor offers in evidence a letter written by the Intervenor to Receivers, dated February 3rd, 1886, a letter dated February 4th, 1886, addressed to Messrs. Noble & Orrick, signed by the Receivers by their Agent, James F. How, a letter dated February 5th, 1886, addressed to the Receivers, signed by Noble & Orrick, a letter dated May 17, 1886, addressed to James F. How, General Agent of the Receivers, signed by Noble & Orrick, as attorneys for the St. Louis, Kan-

sas City & Colorado Road, a letter dated May 18th, 1886, addressed to Noble & Orrick, attorneys for the St. Louis, Kansas City & Colorado Road, signed by James F. How, General Agent, a letter dated July 2nd, 1886, addressed to the Receivers, signed by Noble & Orrick, attorneys for the St. Louis, Kansas City & Colorado Railroad Company, and a letter dated July 3d, 1886, addressed to Noble & Orrick, attorneys for the
139 St. Louis, Kansas City & Colorado Road, signed by James F. How, General Agent, and they are marked respectively Exhibits E. 1, 2, 3, 4, 5, and 6.

(Insert.)

Intervenor rests.

John C. Orrick, sworn for the Receivers testified as follows:

Direct Examination

By Mr. Blodgett:

Q. Are you the attorney for the petitioner?

A. I am one of them.

Q. Have you had general supervision and charge of their legal business in the State of Missouri?

A. Gen. Noble and myself have had; he is absent.

Q. You are one of the firm of Noble & Orrick, and your firm has been the legal advisers of the petitioner since it began work in the State? A. I think so.

Q. Do you know, or have you, as attorney for that company, any knowledge as to whether the petitioner has acquired any right of way between Forsyth Junction and the north line of the park?

A. I do not think the right of way has been actually acquired, there has been some negotiation, and the line of the road extends to Union Depot.

Q. It has been located? A. Yes sir.

Q. On paper? A. Yes sir, that part of it.

Q. It is on paper? A. Yes sir.

Q. But the right of way for a line of railroad between Forsyth Junction and the park has not as yet been acquired by the petitioner, to your knowledge?

A. No, it is a clear piece of prairie, a piece of road that could be built in four or five days. It is near Union avenue, and it was a question there where it would be best or
140 or how to cross the Wabash road when the connection is made at Union avenue. One idea is to cross the Wabash road at Forsyth Junction and swing around and come in there, and the idea was, that might be objectionable to the Wabash road, and the other to go on the other side, and the hope was all the time that some amicable arrangement could be made whereby they could use Forsyth Junction instead of mak-

ing a junction at Union avenue, where the avenue is being used by wagons and pleasure vehicles, etc., that it would be better for the public and more for the interest of the Wabash road to have the connection a little north. It was a mere matter of detail, but if that could not be arranged it would be necessary to swing across and run into Union avenue, which could be done in a few days. There are no obstructions at all. It is meadow on either side, level ground, and it is only a matter of two or three days work. Of course, until that matter was determined it was deemed unadvisable to say just what side of the Wabash track we would make the connection at Union avenue, and for that reason it is not built down, but as we say, it is near there, and it is a matter of only two or three days to make the connection.

By Mr. Dyer:

Q. Is there anything else you wish to state?

A. I wish to state this while I am on the stand: that just prior to the 2nd day of July, 1886—I notice this letter of ours to Messrs. Humphreys and Tutt is dated July 2nd, 18 blank—that should be 1886—that a week or two prior to that myself and Col. Emerson, and I think Mr. Brown, called on Col. Talmage with reference to making an amicable arrangement outside of any contract
141 for the use of the track of the Wabash road between Forsyth Junction and Eighteenth Street or the north line of the park, if that was deemed desirable, but the idea was that this whole matter could be settled outside of any papers in the case, that it would be more for the interest of both parties to make some amicable arrangement outside and use the track from Forsyth Junction in. It had been suggested to me by Col. Brown that such an arrangement could be made outside with Col. Talmage. At his suggestion I went up with him to see Col. Talmage, and we had a pleasant talk about it, and it did not result in anything except, I think, Col. Talmage said he would have to get some figures from his traffic man, that he was going away and would return probably Saturday of the next week and then he would see what could be done. That was all of that interview. The whole idea of the interview was of some amicable arrangement outside of any contract in the case, with a view of coming to an agreement to use their track from Forsyth Junction in. I was not present at any other interview, but another was had I believe, and I was informed he refused to allow—

Counsel for the Receivers objects.

The witness: On information which I obtained as to what they would do, we wrote the letter of July 2nd, 1886, which is a formal demand made upon them, I having then been satisfied

that no outside or amicable arrangement could be made about anything. This letter was then written at the request of the company by us, and in this letter, as your Honor will see, we say: (Witness here reads the letters of July 2nd, and the reply.) Since that time there has been no communication on the subject with the officers.

142 Q. Prior to the date of July 2d all negotiations then pending were for an amicable arrangement to use the line of railway from Forsyth Junction in?

A. Yes, sir; Col. Brown assured me he thought he would be able arrange with Col. Talmage about it and there would be no trouble about it, and they would fix it up among themselves, and they did not want any lawyers about the business. I never went back, and when that was all off and abandoned, then I opened the formal correspodence, making the demand under the tripartite agreement.

By Mr. Priest:

Q. As you conceive the tripartite agreement to be?

A. Yes, sir, under my construction of it. Since that correspondence we have had no communication with them at all on the subject, and soon after the bill was filed.

A. A. Talmage, sworn for the Receivers, testifies as follows:

Direct Examination

By Mr. Blodgett:

Q. What is your occupation, Mr. Talmage?

A. General Manager for the Receivers of the Wabash, St. Louis & Pacific Railway.

Q. As General Manager you have charge of all the lines of railway operated by the Receivers, have you? A. I have.

Q. How long have you been engaged in railroading?

A. A little upward of thirty years.

Q. Are you familiar with the right-of-way and railroad tracks of the Wabash between Forsyth Junction and the Union Depot in the city of St. Louis? A. I am.

Q. Have you ever had occasion to make any figures with respect to the value of the tracks and the right-of-way

143 from Forsyth Junction down to the Union Depot?

Mr. Orrick, of counsel for Intervenor, objects to the question as irrelevant; objection sustained.

Q. Are you familiar with that portion of the railroad track and right-of-way of the Wabash Company between the north line of the park and the Union Depot? A. I am.

Q. Have you ever examined it with a view of ascertaining its value? A. I have.

Q. Will you state what you estimated the property as being worth?

Counsel for the Intervenor objects to the form of the question.

Q. Well, I will ask you to state what you now consider the property to be worth; go on and state what you have done—you can state how you came to form your opinion?

A. Some time ago at the request of the C., B. & Q. for an entrance into this city over our tracks, I had our engineer go over the values and cost of the property and get up figures, I went over the same with him, and I consider the value of that property to be between a million and a quarter and a million and a half of dollars, but in estimating at that figure it is based on the property having been purchased some time ago and without the improvements with which a similar right of way, parallel to this would be burdened. In other words, a right of way parallel to this from the north line of the park into the city would destroy a good deal of valuable property and that would add to the cost probably of a similar right-of-way and a track with the same facilities that the Wabash possesses now.

Q. What would be value of the 3,600 or 3,700 feet from
144 the north line of the park up to Forsyth Junction?

Mr. Orrick, of counsel for Intervenor, objects to the question as irrelevant; objection overruled, the Master stating that the testimony may be competent to show the nature of the ground at Forsyth Junction and the park over which this road expects to build its line.

A. Very much less per mile than that portion of the line this side of the park, from the fact that the road runs through what we call farm lands that can be purchased by the acre beyond the park; whereas this side of the park it is mostly through town lots that are purchased at a very much higher valuation.

Q. Now is the same true of the line from Forsyth Junction on to Ferguson?

A. Yes, sir, the same is true and even to a greater extent as you go towards Ferguson the land gets cheaper per acre.

Q. What would you consider a fair valuation of the right-of-way and superstructure of the Wabash Railway from the north line of the park to the Union Depot with such of its appurtenances as are necessary to operate it as a railroad in the City of St. Louis?

Counsel for the Intervenor objects to the question as Intervenor is not asking for the appurtenances.

The Master: What do you mean by appurtenances?

Mr. Blodgett: I mean side tracks and such conveniences as are necessary to have in order to operate it as a railroad.

The Master overrules the objection, stating that counsel can limit the matter in cross-examination if they desire.

A. I consider that property worth at least a million and a half.

145 By Mr. Blodgett:

Q. Will you state to the court whether you have or have not refused to do business with the company, this petitioner?

A. We have not refused to do business with them, but we have received and forwarded all the freight that they have offered to us, and we are carrying passengers daily for their line, and, in fact, at the request of their representative, Col. Emerson—I think it was Emerson—I agreed to put on an additional train between Forsyth Junction and St. Louis in order to accommodate people coming in from the lake in the evening. They claimed that the other trains we were running arrived at the depot a little too early, but the balance of their business can be accommodate by the trains that we run between here and Ferguson, and the passenger business is being done on those trains now.

Q. In fixing on the terms on which you would do business with this connecting line have you discriminated against it in any way?

A. I have not discriminated against them in any way. The patrons of their line have the same rates that any other persons do that travel between here and Forsyth Junction or a similar distance, and the rate of freights charged on the materials or supplies or freight that they deliver is the schedule rate for such freight. I objected to their running an engine or cars over our track, stating that I had no authority to bring the trains of any foreign road into the Union Depot, and that they must negotiate with the governing board at the Union Depot first, and after they did that, if they would come to me then, I would talk to them about running their trains, but that that must be first arranged before I could arrange with them.

146 Q. It is true that you did refuse to permit them to run their own trains over the Wabash Railway between Forsyth Junction and the Union Depot? A. Yes sir.

Cross Examination

By Mr. Orrick:

Q. Or through the park into the Union Depot anywhere on that track?

A. I do not think the park was mentioned in the conversation between myself and the officers of that road. Our talk was entirely in regard to business to and from Forsyth Junction.

Q. The idea was to make some amicable arrangement; wasn't that the purpose of the interview? The idea, as I understood it, was to get their trains over our track.

Q. Under some amicable arrangement?

A. Well, under any arrangement that they could get.

Q. They were seeking to make some arrangement with you?

A. They were only seeking to get there, as I understood it; it did not make much difference what for, but mainly to get there.

Q. You say you have proposed to accept their business and have been carrying freight for them; that is on your own cars, between the Union Depot and the junction, and you have charged the local rate for it, have you not? A. Yes, sir.

Q. Do you remember how much you charged them for hauling a car load of iron from the Union Depot, say 30,000 pounds?

A. Four cents a hundred; ten tons, $8; and for fifteen it would be $12.

Q. Those cars ordinarily hauled fifteen tons?

A. They haul from ten to twenty tons.

Q. If it were a twenty-ton car it would be $16 a car?

A. It would be of course that much more.

147 Q. How far is it from Forsyth Junction to the Union Depot? A. Four and three-quarter miles.

Q. Now, as to passengers that you have hauled, you simply mean to say, do you not, that you hauled them in your cars; that they got off of your cars at Forsyth Junction and could take our cars on our track if they saw proper to do so?

A. Yes, sir.

Q. Are you familiar with the real estate values between the north line of the park and Eighteenth street? Have you been in the real state business to any extent in this city?

A. I have not been in the real estate business.

Q. You have valued this road between the north line of the park and Eighteenth street at from a million and a quarter to a million and a half dollars, I understand? A. Yes, sir.

Q. What do you include in that valuation?

A. I include the track, the main track and the side tracks.

Q. Does that include all the property of the Wabash in the Union Depot?

A. It includes the property between the west line of the park and the Union Depot, that is, the real estate and tracks, the side tracks laid thereon, and other appurtenances necessary for doing business.

Q. How much real estate has the Wabash road outside of this 30 fee of right of way?

A. Not a great deal, some fractional pieces; it was necessary to acquire them in order to get the right of way that was acquired.

Q. Does this plat show them? You seem to have whole blocks here, nearly. Now, outside of this right of way, what is this real estate worth?

A. The bulk of them—I do not know whether that map is made up to the present time and shows the side tracks that are in there or not.

148 Q. Here is nearly a block of ground, I see?

A. Yes, sir; that is covered with tracks.

Q. Those are side tracks for storing your cars?

A. For switching and handling trains. You can't run trains unless you have got a place to pass trains and put them out of the way, or a place to put trains when they arrive here, so that you can handle them and sort out the cars and get them out of the way of trains going out. All this ground, nearly, is covered with tracks.

Q. Your company does a large business?

A. We do some considerable business.

Q. In making this estimate of a million and a half of dollars, what proportion of that amount do you estimate for the track and right of way from the north line of the park through the park and to the eastern end of the cut?

A. I did not make it separately; I couldn't give you that figure without going over my details again.

Q. About?

A. No, sir; I never make any guess work at figures.

Q. Are your figures of a million and a half dollars made on actual sales of real estate adjoining this right of way?

A. They are based on the best information we could get from the best real estate men in the city as to what the value of the property is, and comparing what has been paid recently by other companies owning ground parallel with this.

Q. Is there any other road parallel with this, through the park, along there?

A. Not through the park, but there is this side.

Q. Well now, it is four miles from the north line of the park to the Union Depot; $1,500,000 would be nearly $400,000 a mile, wouldn't it? A. Pretty near.

149 Q. How much of this four miles does this track cover to the east end of the cut?

A. I do not remember the length.

Q. Will you look at that plat and inform the court?

A. I do not know whether this has the figures on it or not.

Q. Nearly a mile, isn't it?

A. They have not any figures on this map to show that distance.

Q. From your recollection, would you say it is about a mile from the north line of the park to the east line of the cut?

A. I should think not so far as that, not very much over half a mile.

Q. And you can't give me any estimate on the value of that? A. No, sir.

By the Master:

Q. Can you give me the value or the approximate value of the right of way and the main track from the north line of the park to Eighteenth street and the Union Depot?

A. I thought I had covered that in my testimony.

Q. You included the sidings?

A. Oh, you mean the main track, stricken out from the sidings?

Q. Yes?

A. I couldn't do that without going into a calculation. We could not operate without the sidings, we could not pass trains nor take care of trains after receiving them, nor made them up to go out without the sidings.

Q. Would that be so with another road that would run over your track?

A. Yes, sir; we would have to have additional track room if there was another road. We have not enough now to warrant our bringing another railroad in and be able to handle the trains successfully outside of the loading and unloading of freight. I mean simply to pass trains, putting
150 additional trains on the track, taking care of them after they arrive here, making them up ready to go out and the storing of cars; you can't do business without having some place to put your loads, and some place to put your empties away; some place to hold them to unload when people are not ready to unload them, and the facilities are not sufficient here now to admit of our taking any more business without acquiring more property. That is why I say the whole property wants to be taken in the valuation.

By Mr. Orrick:

Q. The Union Depot Company has side track facilities, have they not?

A. Yes; they have for loading and unloading, but not for making up trains, excepting passenger trains.

By the Master:

Q. Would it be practicable for any other road subject to your rules and regulations to use the track from the north line of the park to the depot; I mean the main track?

A. It could be done under the rules and regulations of this company, but usually it is done by substituting the motive power and train men of our own road to handle the trains of

foreign roads. That is the way we handle the Keokuk & Northwestern line.

Q. That is you take charge of their trains?

A. We furnish them the motive power and the train crews. I offered at one time to make some such arrangement if we could agree upon terms with these people, but the whole negotiation must be subject to their first having obtained an arrangement to enter the Union Depot from the governing board. That is the only thing that suspended the negotiations referred to by Mr. Orrick as having been under-
151 taken with me to get an entrance in here. I stated to them when they succeeded in arranging at the Union Depot for the sale of their tickets and for the admission of their trains, then for them to come to me and I would talk with them further, whether we would run them or not.

Q. Does the Union Depot Company control the entrance of trains into the Union Depot east of Eighteenth street?

A. The Union Depot Governing Board controls the admission of railroads into that system on those grounds.

By Mr. Blodgett:

Q. East of Eighteenth street? A. Yes, sir.

By the Master:

Q. What are the usual arrangements where one road uses a portion of a track of another, as to the basis of compensation?

A. It is generally based on a rental based on valuation of the property, and for repairs of track and other necessary expenses connected with the operation, it is on the basis of wheelage which represents the percentage that the tenant line bears to the other, represents the percentage that it bears to the total number of cars passed over the line.

Q. If the renting line passed one-tenth of the number of cars that the owning line passed over the track, it would pay one-tenth of this?

A. It would generally pay one-tenth of the repairs, but the custom in regard to the fixed charges, as we term it, is one-half. Another road is allowed to use the track, a foreign road is allowed to use the track of the parent road, by paying one-half of the value of the track, the rental, the interest on one-half of the value of the property.

152 Q. Six per cent. interest, is that the basis used usually?

A. That is a matter of agreement; there are places where eight per cent. is paid.

Q. Can you give any illustrations where that rule applies?

A. It applies between the C., B. & Q. and the Wabash Road, between Camp Point and Quincy. The property was all valued and everything agreed upon, the price of everything, and the Wabash paid one-half of the interest on the valuation. That is at the rate of seven per cent. there. When we operated the T., P. & W. we had a similar arrangement running into Burlington and there we paid eight per cent. on one-half of the valuation of the trackage and paid bridge tolls and other terminal expenses in addition.

Q. Is it generally understood among railroad men as a usual basis, or is it subject to contract arrangements between the two lines?

A. It is generally a matter of contract and agreement between the two lines.

By Mr. Orrick:

Q. This C., B. & Q. road is a large trunk line like the Wabash, is it not; it has a good many miles of track?

A. The C., B. & Q. have a good many miles of track.

Q. That is, the Wabash and C., B. & Q. are roads of about equal prominence as to business? A. Yes, sir.

Q. If there is any difference, probably the C., B. & Q. does the larger business, does it not?

A. They have more miles of road than the Wabash has now, and on that account do more business.

Q. I will suppose a case, not this case, if you please, I will suppose a case of the C., B. & Q., which has a large mileage and does a large business. Say they had made a contract with a small road, doing a small business, whereby they
153 had agreed to let it use its right of way for a certain distance for a fair and equitable compensation. Now, would you say that it would be fair and equitable, under such circumstances, for the C., B. & Q. to charge this small road the interest on one-half of the value of the track used, or would it not be fair and equitable to charge according to the wheelage in that case?

A. I never have known one railroad company to allow another railroad company—

Q. I am speaking in this case of where there is a contract, I am not speaking of where parties stand at arm's length, but where there is a contract beforehand. They say, "We will let you use this on a fair and equitable compensation." I will ask you whether, in your opinion, it would be fair and equitable, under that state of facts, for the C., B. & Q. to charge one-half, or would it not be more fair and equitable to charge according to the wheelage?

A. I would consider it fair and equitable to charge one-half, and in all my experience I do not call to mind now a single in-

stance where there has been any other arrangement made. There are a great many cases where one line uses the track of another that does not do near the business that the parent line does, or the line that owns the property, but the circumstances that govern in those cases are these—they have been where negotiations have been made—that if they did not use this line, they would have to build their own line and then they would have to pay all the interest; therefore it would be better, even if they had only a small amount of traffic, to pay half the interest or an interest on half the valuation than to build a line of their own and have to pay all of it.

154 Q. Do you mean to say that you know of any instance or can point out any instance in your own knowledge, where there was a contract between one road and another, whereby the one road agreed to permit the other road to use its right-of-way and tracks for a fair and equitable compensation, that in ascertaining that fair and equitable compensation, one-half was charged—do you know of a case of that kind?

A. I do not know of any contract in existence on any other basis than paying one-half.

Q. You know of no contracts for use by any road in this country where they divide according to the wheelage basis?

A. I do not.

Q. Do you know anything of the arrangement between the Texas Pacific and the Denver & Forth Worth roads, four miles north of Forth Worth?

A. I do not know anything about what arrangements they have now.

Q. Do you say that you never knew of such an arrangement!

A. No, sir; I never knew of such an arrangement to be fixed charges on a wheelage basis.

Q. What do you mean by fixed charges?

A. Rental on bonds—interest on the valuation of the property.

Q. Is the wheelage basis a thing that is strange to you?

A. Not for dividing the expenses of maintenance.

Q. You say you know of no arrangement whereby the use of the track has been ascertained—the value of the use of a common track has been adjusted on a wheelage basis?

A. I have answered that.

Q. I did not catch your answer?

A. I answered that I know of no arrangement where the rentals were paid, on a wheelage basis.

155 Q. You are now the manager for the Receivers?

A. I am.

By Mr. Blodgett:

Q. These arrangements of which you have spoken, these cases in which one company desiring to use the tracks of another

has agreed to pay one-half the interest on the valuation, and then pay the cost of maintenance according to the wheelage—those arrangements are considered fair and equitable, are they?

A. Yes, sir.

By Mr. Orrick:

Q. In those cases the party who pays half does not own half of the road, either? A. No, sir.

Q. And has no control over it except subject to the orders of the controlling road? A. That is all.

By Mr. Priest:

Q. As an illustration we will say that the St. Louis and San Francisco Railway Company desire to obtain the use of that part of the line of the Missouri Pacific Railway from Kirkwood into St. Louis to the Union Depot. The ordinary and usual arrangement that would be made between the two companes would be first to agree on the value of the Missouri Pacific line from Kirkwood into the Union Depot? A. Yes, sir.

Q. Suppose that value was two million of dollars; you would count that as one factor of the fixed charges, would you not?

A. Yes, sir.

Q. What other factor would be added to that as a fixed charge?

A. The necessary terminals that must be used here in order to bring those trains in and prepare them to go out.

Q. Are taxes always considered in addition to the value of the road as fixed charges? A. Yes sir, certainly.

156 Q. Then you charge an agreed per cent. on the value of the road and always divide the other fixed charges, such as termina! facilities and the taxes by two, and the San Francisco road would pay one-half of that?

A. Yes sir, one-half of the whole.

Q. One-half of the total sum of fixed charges, the taxes, interest and terminal facilities; now then the payment to be made by the San Francisco road for maintenance and operating expeses would be determined on wheelage basis?

A. The percentage that their cars bore to the total number handled.

Q. That would apply exclusively to maintenance?

A. To maintenance and operating expenses.

Q. So that in determining these things you classify the payments in two classes, first the fixed charges, and second, the operating expenses or cost of maintenance? A. Yes sir.

By Mr. Orrick:

Q. What do you include in maintenance and fixed charges, are taxes included under the head of maintenance, or under what head?

A. No sir, taxes are always separated from maintenance. They are fixed charges; I think they are about as much fixed as anything you can fix. I do not see how you can get rid of them.

Q. They vary from year to year? A. Yes sir.

Q. But some roads include taxes under the head of maintenance, do they not?

A. I do not know of anybody that does.

Q. It being a charge that is more or less varied each year?

A. It varies very little; it is liable to be more, but never less.

Q. Do you know what the taxes of the Wabash Rail-
157 road are?

A. I do not remember; they are a good deal too much I know.

Q. About how many thousand dollars?

A. Somewhere between twelve and twenty.

Q. What is the rate of taxation, do you know?

A. I do not remember just exactly. It is between two and one-half and four per cent I believe. I do not remember, I have not gone into details on tax matters very closely.

Q. The City of St. Louis tax is about $2.60?

A. I think that is about what my tax returns are.

James F. How, sworn on the part of the Receivers, testifies as follows:

Direct Examination

By Mr. Blodgett:

Q. What is your occupation?

A. I am general agent for the Receivers of the Wabash, St. Louis & Pacific Railway Company.

Q. How long have you held that position?

A. Since the appointment of the receivers.

Q. When was that? A. May 28th, 1884.

Q. What was your business prior to that time?

A. I was secretary of the Wabash, St. Louis & Pacific Railway Company immediately prior to that time.

Q. Prior to that what was your occupation.

A. Secretary and vice president of the St. Louis, Kansas City & Northern Railway.

Q. As secretary and vice president had you occasion to approve vouchers and keep yourself posted with respect to the cost of the railway and the appurtenances of the St. Louis, Kansas City & Northern Railway Company between the Union Depot and the north line of the park in the city of St. Louis?

A. Yes, sir.

158 Q. State now to the Court what to the best of your recollection was the actual cost to the St. Louis, Kansas City & Northern Railway Company—of that property?

Mr, Orrick, of counsel for the intervenors, objects to the question for the reason that the vouchers are the best evidence as to the cost.

Objection overruled, the Master stating that the witness [it] not to state the contents of the vouchers, but his remembrance in the matter.

A. My rememberance is that it cost between $1,000,0000 and $1,100,000. I would say in connection with this, my remembrance of the cost of the whole road is that it was one million and a quarter dollars ($1,250,000). I don't think any figures were made to show what it cost from the north line of the park, but the expenses there at a liberal estimate would not exceed over $250,000.

Q. From there to Ferguson?

A. From there to Ferguson.

Q. State to the Court what you would consider a present fair and equitable valuation of the right of way and superstructure and its necessary appurtenances from the north line of the Park to the Union Depot?

A. I think as the road stands to-day, it could not be built for less than $1,800,000. If a new line had to be built in the city, a similar line, it would cost fully two million five hundred thousand dollars ($2,500,000). I mean by that, that if a new line was built there would be buildings on a great deal of the property, which would have to be paid for, and although they would be worthless, they would increase the cost, and do not come in the calculation as the road stands to-day.

Q. Much of the way solid blocks of buildings would have to be removed? A. Yes sir.

159 Q. And that would increase the cost?

A. Yes, sir; it would increase it very materially.

Q. What do you know about the connection of the St. Louis, Kansas City & Colorado Railway with the Wabash, how it is connected, and where and on whose ground?

A. Up to a few months ago they had no connection; at their request we made a connection at Forsyth Junction over own ground. My remembrance is they furnished material; at least a part of it, for a distance of several hundred feet, probably three hundred feet.

Q. Then that connection was made you say with the consent and approval of the receivers, and over the right of way of the Wabash, St. Louis & Pacific Railway Company? A. Yes sir.

Q. Have you known any disposition on the part of the receivers to refuse to do business with that road or to accommodate them? A. No sir.

Q. As a connecting line?

A. No sir; we would be very glad to do business for them.

Q. That connection was made and the track of the St. Louis, Kansas City & Colorado Railroad was connected with that of the Wabash as a mere temporary arrangement and for their accommodation, was it not?

A. Yes sir; for their accommodation. It is our track and we can take it up any time we want to; of course, we would have to surrender to them the material, they put in, if we took in up.

Q. It was made with that understanding?

A. I don't know whether anything was said at the time, but that was the understanding.

Q. Now, as an officer of the Wabash, St. Louis & Pacific
160 Railway Company, have you had occasion to know the terms that are usually, or if you have become informed of the terms that are usually made between railway companies for the joint use of tracks and railway property? A. Yes sir.

Q. The Wabash Railway has in operating its lines made many such contracts for the use of other lines, and have they not in certain instances admitted other railroads to the use of their tracks?

A. They have done both in a number of cases.

Q. Well, now, where did they make one?

A. They have an arrangement by which at present they are running from Camp Point to Quincy over the track of the C., B. & Q. We formerly had an arrangement by which we ran into Burlington—

Q. Hold on. On what terms; what were the terms of that arrangement with the C., B. and Q. from Camp Point to Quincy?

A. The valuation of the property was arrived at, and we paid the interest on one-half of that valuation at the rate of eight per cent per annum, and we still pay it, and we pay for the maintenance of the track on a wheelage basis.

Q. Now you speak of an arrangement by which the Wabash ran into Burlington; what were the terms of that arrangement and with whom was it made?

A. That was made with the C., B. & Q. on the same basis.

Q. State the terms?

A. That is we arrived at a valuation of the track, and I think we paid interest in that case at seven per cent, and one-half of the valuation and the expenses were divided on a wheelage basis.

A. Is there any other arrangement?

A. Yes, sir; we have an arrangement by which we run over the Peoria and Pekin Union Railway from Hollis into
161 Peoria. In that case we arrived at the valuation for the road, and we paid interest on the whole of it. The

Peoria and Pekin Union were not using it at all, and of course we paid all the maintenance.

Q. When it was used by us solely we paid interest on the valuation and all the cost of maintenance? A. Yes, sir.

Q. Are there any other arrangements?

A. At Detroit, we run three and a half miles into the Detroit Union Depot, and we pay there seven per cent on the valuation, with the understanding—that is my remembrance only, I have not refreshed myself on that for some time, and if any other line comes in to use that property—we are using it solely now—that the interest shall be divided.

Q. We are now the sole tenants? A. Yes, sir.

Q. And we pay the interest on the valuation?

A. Yes, sir.

Q. With the understanding that if another company comes in they will pay one-half, is that it?

A. That is my remembrance of it; yes, sir. In Chicago we run over the Western Indiana Road over five miles, making our entrance into that city. We pay there a fixed rental each month, based, however, on the valuation of the property we use.

Q. At an agreed percentage?

A. At an agreed percentage, yes, sir.

Q. It is six per cent, is it not?

A. I think it is six per cent. We also pay there for the maintenance according to the wheelage.

Q. Where you have the exclusive use of any property who pays the rental on that?

A. We pay the entire rental on that on a valuation basis.

162 Q. Have you got any arrangement with the Pittsburg or Pennsylvannia Company?

A. We have an arrangement with the Pennsylvania Company by which they run over our track for fifty-five miles from Kokomo Junction to Indianapolis. They pay six per cent. on one-half of the valuation and they pay the maintenance in accordance with the wheelage.

Q. They pay six per cent. and one-half the taxes, do they not? A. Yes, sir.

Q. What is the arrangement by which the Wabash uses the line from the State line of Illinois to Logansport, Ind.?

A. It was exactly a similar arrangement; we pay the interest on one-half of the valuation of their track, and we pay one-half of the taxes and the maintenance on the basis of wheelage. We have one or two others. We have an arrangement with the Louisville, New Albany and Chicago road to use five and a half miles of our track from Hollis into Indianapolis, paying six per cent on one-half of the valuation, and

paying one-half of the taxes, and for a long time they paid a portion of the maintenance on the wheelage basis, but now they pay a fixed sum per month for maintenance, and their proportion of the expenses.

By the Master:

Q. Is that fixed sum arrived at on the basis of what they had been paying before? A. Yes, sir.

By Col. Blodgett:

Q. That is on a percentage?

A. Yes, sir; and also on the basis of what their expenses were before.

By the Master:

Q. An average wheelage? A. Yes, sir.

By Col. Blodgett:

163 Q. All arrangements such as you have mentioned as having been made and having existed between the Wabash and its connecting lines, are they about such as are generally made between railroad companies under such circumstances, and are they such as are considered fair and equitable?

A. Yes, sir; I think those arrangements are so common that it is almost a rule to adopt that as a standard.

Cross Examination

By Mr. Orrick:

Q. What did I understand you to say you valued this property at between the north line of the park and Eighteenth street?

A. I said that I valued it as it stood at about one million eight hundred thousand dollars ($1,800,000).

Q. What did you value the whole line at from Ferguson in?

A. I said it cost, in my remembrance, about a million and a quarter of dollars.

Q. What do you value it at?

A. I think that was ten years ago, and I think the property could not be purchased at anything now like the price it cost then.

Q. What do you value it at now?

A. I think it would be worth over two million dollars.

Q. As a railroad?

A. As a railroad; that is I think would cost that much to replace it.

Q. The Wabash in operating its railroad, of which this is a part, failed and went into the hands of a Receiver since this road has been built, did it not? A. Yes, sir.

Q. What do you say this road between the north line of the park and Eighteenth street cost?

A. I said the figures were not separated, the cost of the line from Ferguson to St. Louis, but estimating—

164 Q. What did it cost from Ferguson to St. Louis?

A. My remembrance is it cost about a million and a quarter dollars.

Q. Did you get that information from an examination of the vouchers of the amount paid out for that road?

A. No, sir, not recently; that is my remembrance of information I got, I was fully conversant with the property at that time.

Q. Did you ever make an examination of the vouchers with a view of ascertaining what the road between Eighteenth street and Ferguson cost?

A. We kept an account, Mr. Lewis and myself, at the time of building of what the road was costing us, and my remembrance is based on those figures made at that time.

Q. And you say it was about a million and a quarter of dollars? A. About a million and a quarter, yes, sir.

Q. There was some quite heavy work west of the park where you crossed the road leading to Ferguson, some very heavy and expensive bridging over cuts between the park and Ferguson?

A. Some pretty heavy work after you get out to Normandy.

Q. There were some very heavy expenses incident to bridges across the Pike road, were there not?

A. The bridges were not so expensive as the cuts and fills.

Q. There is a large arched bridge across the county road this side of Ferguson, is there not?

A. I think there is an arch there.

Q. And there are heavy cuts and fills all through there?

A. Yes, sir.

Q. You have never made any estimate as to the cost of the particular parts of this road?

A. You mean the cost at that time, no sir.

165 Q. And you have gone over no vouchers since then for the purpose of ascertaining what the portion of the road between the north line of the park and Eighteenth street cost?

A. No sir, except this, the vouchers were made up, at least the estimates were made up which Col. Talmage referred to in his testimony, as to the valuation of the road to-day.

Q. I understand, I speak of the cost. Can you tell me about what proportion of this valuation of $1,250,000 the road between the north line of the park and Eighteenth street, the road through the park to the east end of the cut east of the park cost? For instance, you have given an estimate of $1,250,000 for the road between the north line of the park and Eighteenth street; I understand you to say that is a mere estimate; now, on the same basis what would you estimate that portion to

cost from the north line of the park to the east end of the cut, that is through the park to the east end of the cut, what proportion of that cost would that be? A. I couldn't tell you.

Q. Well about?

A. I think we paid this $1,250,000 principally to get into the park, that was the way we looked at it at that time. I would calculate that the passage through the park would cost us that much and the additional work, at a rough estimate, a very rough estimate, I should think it would cost over $200,000, or may be $220,000, through the park and cut.

Q. What would be the present proportionate value for that portion of the line of the $1,250,000?

A. I put my present valuation at $1,800,000; I said I did not think the line could be put there to-day for $1,800,000.

Q. Of course it could not be put there at all?

166 A. I mean if that property was all clear of houses I don't think you could buy it for that.

Q. You say the present value of the whole is $1,800,000, what proportion of that is made up of the property between the north line of the park and the east end of the cut?

A. Fully one-fifth of it.

Q. Have you made any critical examination of the different pieces of property through which this line passes east of the park with the view of determining the present valuations?

A. No more than this, Mr. Orrick, we have bought some property adjacent to the line of our road, and I have been pretty fully conversant with the property sold and bought by others, and comparing the prices that that property has brought recently within the last two or three years, with the prices that we paid when we built that line, I arrived at the idea I give.

Q. Have you bought another right of way 30 feet wide adjoining this right of way recently, or since you bought that?

A. No, sir; but we have bought isolated lots here and there, and the San Francisco road has bought a right of way adjoining us for quite a lengthy distance, and I know what figures they paid.

Q. Did you ever estimate what $1,800,000 would be per acre for a right of way 30 feet wide between the north line of the park and Eighteenth street?

A. I never have estimated that, but I have found when buying property for railroad purposes that estimates in use on other occasions will not apply.

Q. I mean per acre or per foot; how much would it be?

A. No, sir; I have never figured it out; I know what the 'Frisco road paid and I know that our calculations, on which we give these figures, are based a good deal on that and experience of our own.

167 Q. Did you find the cost of a lot in one particular locality and put that on the whole line of your road.

A. Yes, sir.

Q. You did not take up lot by lot in a particular location and go right along and ascertain the value?

A. We tried to take lot by lot in blocks. If we knew of a lot being sold in a certain block, or of two or three lots, we adopted that as the basis of that block.

Q. In speaking of that valuation, did you value a strip of land 30 feet in width; did you put the value of a whole lot upon that?

A. Yes, sir; we generally found it necessary for us to buy a whole lot when we wanted to buy 30 feet only. A road cannot get along with 30 feet running into the city of St. Louis, as it has to have side tracks, as Col. Talmage explained in his testimony.

Q. You can put a side track on 30 feet, and you have done that in regard to the Wabash Railway?

A. Yes sir; but you have to have several side tracks running into town.

Q. You are using this now to Grand avenue, are you not?

A. I don't think to Grand avenue; we have more than 30 feet beyond Grand avenue. After you get towards Rock Springs then we have been using that.

Q. Then I understand you in estimating values, where you found a lot with the ordinary depth that cost so much per foot you would put that cost on a depth of 30 feet?

A. We have done this where we had a certain piece of property that cost us $25 a foot when we bought it, and when the property adjoining it at that time could be bought for $25 a foot, and it now costs $100 a foot, we calculate that our $25 property is worth $100.

168 Q. What is the depth of those lots? A. They vary.

Q. When you take 30 feet off of the depth you charge that 30 feet with the cost of the whole lot? A. Yes, sir.

Q. Coming to the matter of the use of tracks by other roads, in any cases to which you have referred where the Wabash is either using the track of other roads, or other roads are using its tracks at any place, was there a contract in existence before any of those roads were constructed which required them to permit these other companies proposing to use their right of way, to use the right of way for a fair and equitable compensation?

A. Well, in the two cases I think of now the roads were not built until after we had made a contract with them for the use of them at certain terms which we thought were fair and equitable—they were the best terms we could make anyhow.

Q. I understand, but that is not my question.

A. That is the only case.

Q. There is no such case that you now remember?

A. No, sir; not unless you call those cases such.

Q. In other words, where these contracts were made the parties were dealing with each other at arm's length, each one owning their track disencumbered of any prior obligation which compelled it to permit another road to use their track?

A. Well, as I say in the cases of this entrance into Detroit and the entrance into Chicago, the tracks were not built and nothing would have been done if they had not been able to make this arrangement with us.

Q. There you owned the right of way into Detroit?

A. No, sir; we did not; the other parties acquired it after we had made this contract with them.

169 Q. You had no contract with the Detroit Railway prior to that time?

A. There was no Detroit Railroad and there was no Western Indiana road into Chicago until they had made contracts with us agreeing to give us the use of their road after they had acquired it.

Q. That was down in the heart of the city of Chicago, was it not?

A. Our entrance commences about five miles out from Chicago. It is no more in the heart of the city than our entrance is in the city of St. Louis.

Q. Don't you know of any arrangement where a use is had on a wheelage basis? A. No sir.

Q. Have you never had occasion to inquire into the terms of the use of the road between Fort Worth and another place in Texas, I think it is the Texas & Pacific road and the road running north to Wichita Falls, I think it is the Denver & Forth Worth road?

A. No sir; I never had occasion to inquire.

Q. You don't know that is on a wheelage basis?

A. No sir, and I would not accept that as an agreement because it is a very close relation of the Missouri Pacific who were operating the Texas & Pacific when they made that agreement with the Fort Worth & Denver road.

Q. But it was equitable, was it not?

A. I suppose it was, but it was like taking it from one pocket and putting it into the other.

Q. They pay according to the wheels that run over it, according to each one that runs over it—that is equitable, isn't it?

A. I should have to say if it was considered so, railroads would more generally adopt it.

Q. You do not say there is no such an arrangement but that you simply do not know of such?

A. I say in my experience as a railroad man I never heard of it.

170 Q. You mean to say that it is equitable for the railroad owning the road to continue to own the road after the contract for use is made and have the other party using it in conjunction with it to pay one-half practically on the cost of the road? A. I think it is.

Q. If they pay one half why don't they practically own one half?

A. They only pay the interest on one half.

Q. If they have to pay the interest on one half wouldn't that entitle them to equal control?

A. I won't go that far; I will say it is equitable so long as the road that built the line is willing to have them there as partners. I should say in all these arrangements I spoke of they are terminable I think on a year's notice.

Q. In other words they are arrangements made where parties are dealing with each other at arm's length and the owning road is in a position to say, "You must get off of here whenever I want you to."

A. Hardly that, but they may want your road this year and next year they may not want it.

Q. And the arrangements are such that you can terminate them in that way?

A. Yes sir. I think a party who had had the foresight to acquire the property is entitled to a consideration which no one can pay him for.

Q. Where the circumstances are that they got the property by making an agreement, it is not a question of oversight but a question of coincident fact, is it not?

A. I never had any connection with anything of that kind.

Q. So you are not speaking of a case of that kind?

A. No sir, I don't know of a case of that kind.

By Mr. Hough:

Q. You think that, if two parties occupy a house which is owned by one of them on an agreement that they pay

171 interest on the cost of the house, it is not fair that the party who has no interest in the ownership of the house should be given half of the property? A. No sir.

Q. He pays his rent and gets the use of it for that?

A. Yes sir.

By Mr. Orrick:

Q. If a party own a house with six rooms in it and another party uses one room only, is it proper that he should pay half of the rental of the whole house?

A. That depends altogether on how badly he wants to be there.

Q. Suppose the party that owned that house is under obligation or contract to permit him to occupy that portion of the house on fair and reasonable terms, would it be fair and equitable to charge him one half of the rental of the whole house for occupying only one room?

A. He might be such an objectionable tenant as to make you charge him more than that.

Q. Suppose he had agreed beforehand he was not an objectionable tenant and he agreed?

A. It takes two parties to make an agreement.

The Master: Those illustrations would come more properly in the arguments than in the testimony.

Mr. Orrick: Very well: I don't care to ask Mr. How anything further in that respect.

By the Master:

Q. I would like to ask you in regard to arrangements made for the joint use of tracks; were they cases in which the interests of the roads were antagonistic or friendly?

A. They were cases where the roads were competitors. In the case of the C., B. & Q. and those into Burlington and
172 Quincy, both their roads and ours were competing for business there. We have already got notice from the C., B. & Q. that we have got to give up our line into Quincy the first of next May. Whether they want to ask us more rent or what it means I do not know. If they were anxious to have us there on these terms they probably would not give the notice.

Q. Is that so in all the other instances?

A. Well, in the case of the entrance into Chicago and the entrance into Detroit, those roads were only formed to furnish means of entrance for the various roads into those cities. The Pennsylvania Company and the New Albany and Chicago road were competitors of ours into Indianapolis.

Q. Do you remember that the San Francisco ran over the Pacific road here for some time, coming into the city?

A. Yes, sir.

Q. Do you remember what the arrangement between those two roads was, or do you know?

A. No; I know they paid a very heavy rental, but whether it was based on valuation or what I don't know. I understand the arrangement on which they are now running over the Pacific road is on a basis of valuation, they paying half the interest, but what the valuation is I do not remember.

Q. Do you know of any instance where one road has condemned the right to run over another road?

A. No, sir, I don't know of any instance of that kind.

By Mr. Orrick:

Q. In this matter of the C., B. & Q. and your relations with it, as to the entrance into Quincy, have you not complained of the onerous terms which they imposed upon your road in the use of the right of way, and has it not been the subject of acrimonious correspondence between your company and
173 Mr. Perkins?

A. I don't remember any such correspondence. I think there was some complaint about the charges in Quincy, and the charges made over the Quincy bridge, but I don't remember any complaint was ever made about the charges from Camp Point into Quincy.

Q. Well, into Burlington, did you not have trouble about the charges there?

A. They raised the price on us in Burlington above the figures I had given here, and we complained about that.

Q. Are you running into Burlington now?

A. No, sir, we have no road into Burlington now.

Q. There was no contract between you and the Burlington road whereby you were entitled to go over their right of way prior to the time you got possession? A. No, sir.

Wells H. Blodgett, sworn for the receivers, testifies as follows:

Direct Examination

By Mr. Hough:

Q. State to the Master what you know about the arrangement between the San Francisco road and the Missouri Pacific, about which the Master questioned Mr. How?

A. I think it was about two years ago last winter that I was called upon by Captain Hayes, then first vice-president and general manager of the Missouri Pacific Railroad and its leased lines, to prepare a contract between that company and the St. Louis and San Francisco Railway Company for the use of the tracks and terminals between Grand avenue and the Union Depot. I prepared a contract, patterning it after that ex-
174 isting between the Wabash and the Louisville, New Albany and Chicago road for the joint use of the terminal facilities of the Wabash in Indianapolis. The contract was prepared with a great deal of care, and the basis of the agreement was that the property should be valued by disinterested parties, two of whom were named. One was Mr. McCullough, of the Pennsylvania Railroad Company, and the other one I do not recollect, but they were to select a third party, and were to fix the value on the property. Then the Frisco was to pay six per cent. of the valuation and pay maintenance according to the wheelage between the two. I prepared the contract and saw Mr. O'Day afterwards, and he told me it was satisfactory,

and I have understood the contract was signed, although I have never seen it since it was signed. The arrangement, however, was, I think, consummated between them. It is my understanding that it was, although I have never seen the contract since it was under the seal of the two companies; but, as I said, Mr. O'Day told me it was satisfactory to them, and Captain Hayes said it was satisfactory to him.

Cross Examination

By Mr. Orrick:

Q. Those two roads were large trunk roads coming here to St. Louis. At that time the Frisco road had no right under a contract to use that right of way of the Pacific road from Grand avenue in on any terms, had it?

A. Not that I ever heard of, they made no claim of that sort.

Q. And they are roads of about equal prominence coming into the city of St. Louis?

A. They are two leading roads coming into the city.

175 Rebuttal.

Julius Pitzman, sworn for the intervenor, testifies as follows:

Direct Examination

By Mr. Orrick:

Q. How long have you resided in St. Louis?

A. Since 1854.

Q. What has been your business for many years past?

A. I was deputy county surveyor, up to the time of the war, then I joined the army; in 1863 I returned to St. Louis and was elected county surveyor and held that office as long as the county existed, and since the separation of the city from the county I have been city surveyor and practice as civil engineer.

Q. Please state whether for years past you have been what might be considered a standing commissioner; appointed by the courts here with other commissioners, in partitioning real estate and appraising real estate in the city?

A. Yes sir. Since 1863 I have partitioned real estate valued from twenty millions to thirty millions of dollars.

Q. Are you familiar with the value of real estate in the city of St. Louis? A. Yes sir.

Q. Have you made it a study for years past?

A. Yes sir.

Q. Will you please look at this plat, being chart A? I call your attention to a dotted line which represents the right of way east of Forest Park, thirty feet wide, extending to Tayon avenue or Eighteenth street. A. Is that the centre line?

Q. Yes, I will ask you whether you made any exam-
176 ination with a view of determining what the present value of that strip of thirty feet wide, the center of which is indicated by that dotted line, is? A. Yes sir.

Q. Will you please state what its present value is?

A. My estimate of the value of that piece of property is $265,141.

Q. That is its present market value?

A. That is what I consider its present market value and the full market value.

Q. Please state to the Master what familiarity you have with property in the locality covered by that right of way?

A. I have served frequently as commissioner in condemnation proceedings for railroads, for the Union Depot Company, the Missouri Pacific and for the Wabash Railroad, in condemning this very same right of way; besides that, I acted before the Wabash Railway Company proceeded to condemn the property. They had a great many cases where the property was owned by Germans along the line of the road, and they could not come to terms with them, and they asked me to go and compromise with them, and I bought the property at what I considered was the fair value.

Cross Examination

By Mr. Blodgett:

Q. That valuation that you put here of $265,141 is on that strip thirty feet wide? A. Yes sir.

Q. And nothing else?

A. Irrespective of the improvements, rails, ties, etc., whatever may be on the right of way; simply considered as vacant land, level, with the streets thirty feet wide.

Q. In that kind of a strip? A. Yes sir.

177 Q. That is all?

A. No, I will say that I made the valuation of a full sized lot from street to street, I valued it at 120 feet, fronting on a 60 foot street, and running back to a line, and my total valuation of the property was $1,060,565 and then in making the valuation of the property, we always consider the front worth twice as much as the rear of the lot. We took the area of the lot to the center of the street, and valued this land, 120 feet deep, to a 60 foot street; and in order to value its contents by the square foot, we take it through the center of the street and take in thirty feet, which will make 150 feet, and then the thirty foot strip would be one-fifth of the total value. This road does not run regularly through the lots and cuts some of them to a disadvantage, and so in place of taking a one-fifth valuation, I have taken one-fourth, which would be a fair estimate, in my opinion, in the way some of the lots are cut in, taking of the thirty feet.

By Mr. Orrick:

Q. Through the territory through which the right of way goes from Eighteenth street to beyond Grand avenue, what effect, if any, would the taking of thirty foot strip have on the remaining lots that were left, in what respect would it leave it? A. The remaining property owned by the Wabash.

Q. What damage would it be to the adjoining property?

A. I think it would depreciate in the same ratio that you increase the travel on the road.

Q. It would depreciate the value of the lot left?

A. Yes, sir, the more lines of road you run over the same track.

Q. What is the character of the property from Eighteenth street to west of Grand avenue?

178 A. The highest value it has it has for railroad or manufacturing property.

Q. What makes it valuable for manufacturing property?

A. The railroad facilities.

By Mr. Hough:

Q. How much damage to the adjacent property was occasioned by taking the thirty feet?

A. Do you mean when it was condemned?

Q. No, now; how much would it damage the adjacent property to cut the thirty feet out?

A. I can hardly answer that question directly. It depends on the breadth of it. If large enough to use for manufacturing purposes it is appreciated. If there was a strip of land to run an additional switch on to the Wabash it would not depreciate it, but if there was not enough it would.

Q. Do you know of any case where the property owners did not claim damages to the property by taking thirty feet out?

A. No sir.

Q. Did any of them get it?

A. Yes, sir, I think the commissioner did allow in many instances damages to the adjoining property.

Counsel for the intervenor objected to this examination objection overruled.

Q. What did they get?

A. In most instances where the property was bought at private sale by the Wabash road.

Q. I am talking of condemnation proceedings now. Where they contracted for it that covered everything?

A. It depended entirely upon each individual lot what damages were allowed. Sometimes the property was left in bad condition and where perhaps a great portion of the value of the lot was given in place of the thirty foot strip, and in other

cases where sufficient depth was left to use it for a ware-
179 house, hardly any damage was paid.

Q. Do you know the amount of damage they paid over the whole strip?

A. I do not recollect the amount, it is so long since.

L. B. Jones, sworn for the intervenor, testifies as follows:

Direct Examination

By Mr. Orrick:

Q. You reside here in the city? A. Yes, sir.

Q. How long have you resided here?

A. About twelve years.

Q. What is your business? A. Real estate.

Q. What experience, if any, have you with the general character and value of this property, leading out from the Union Depot, say, west of Eighteenth street to Forest Park?

A. I have made it a special business to sell property along the tracks for manufacturing purposes and have purchased for the railroads at different times.

Q. This has been your special business? A. Yes sir.

Q. How long have you been in business in that particular locality? A. Ten or twelve years.

Q. You are familiar with the line of the Wabash Road, as indicated by the dotted line referred to by Mr. Pitzman?

A. Yes sir.

Q. Please state to the Master whether you have recently made an estimate in conjunction with Mr. Pitzman or any other of the value of that right of way of the Wabash Road between Eighteenth street and the east line of Forest Park as indicated by chart A?

A. Yes sir; we made the same estimate and came to the
180 same conclusion as to prices, making five or six divisions of the property from Eighteenth street to Forest Park.

Q. The amount you make is $265,141?

A. Yes sir; the same figures for the total.

Q. That is the present value of this property?

A. Yes sir; I consider that the present value of this property.

Q. Now, in arriving at this estimate you say you made certain divisions? A. Yes sir.

Q. How did you make the divisions?

A. Between Eighteenth street and Twenty-first, twelve hundred feet, at $175 a foot.

Q. How does that compare with the market price?

A. That I should consider about the highest value.

Q. Go on now?

A. It is sold for two hundred dollars and I am negotiating a sale for $150. I put it between the two. Between Mercer

street, Twenty-first street and Jefferson avenue, 183 feet, at $150 a foot.

Q. State on what you base that valuation?

A. On what parties would be willing to pay and have offered, if they could get certain property in there.

Q. Next?

A. Between Jefferson avenue and Compton, 2497 feet, at $100.

Q. What do you base that estimate on?

A. I base that on what a piece of property had been leased for on the south side, which I consider worth less than on the north side.

Q. Go to the next.

A. From Compton avenue to Grand avenue, 2900 feet at $80. I sold a piece of property on the south side at $80 a foot within the last four months, adjacent to the tracks.

181 Q. Do you consider that a fair price for it?

A. Yes sir. Between Grand avenue and Cabanne 930 feet, at $60 a foot.

Q. That is on low ground?

A. Yes sir. I was on the stand as an expert witness for Mr. Obear, for the railroad. I was called on by Mr. Obear to confirm the commissioners' report. They did not give enough. They put it at forty dollars, and ground was estimated at seventy dollars a foot at Grand avenue, and so we put it at sixty dollars all through.

Q. From Cabanne west?

A. From Cabanne to the Manchester Road 1360 feet at $40 a foot, and from the Manchester Road to Forest Park 5,670 feet, at $20 a foot. The total is $1,060,565 by Mr. Pitzman's figures.

Q. That is based on lots of what depth?

A. A depth of 120 feet.

Q. And the thirty feet you have estimated at what?

A. One-fourth. It would make one-fifth, but counting the damage to some lots it would not be quite that much and it would bring it to one-fourth instead of one-fifth.

Cross Examination

By Mr. Hough:

Q. This is an estimate for lots all the way through?

A. 120 foot lots.

Q. How much in the aggregate?

A. $1,060,565.

Q. Now, the estimate you have got there is based on pieces or lots? A. Averaging 120 feet deep.

Q. Do you know what that strip cost the Railroad Company? A. I do not.

Q. Do you know what damages were paid to the adjacent proprietors for getting it?

A. I do not. I put this as vacant ground.

182 Q. Do you know how many houses were torn down for which they had to pay?

A. No, I do not. I took it as vacant ground.

By Mr. Orrick:

Q. What is the general character of this ground from Eighteenth street, say to a point two or three blocks west of Grand avenue, what is it especially available for?

A. Nothing but manufactories.

Q. What effect does the presence of the railroad on a part of a lot have on the balance of the lot?

A. It would make it more valuable. It is worth double what it would be worth if it was off from it.

By Mr. Hough:

Q. This estimate does not include any improvements on the ground, the tracks, etc.?

A. No, only the naked ground.

John Grether, sworn for the intervenor, testifies as follows:

Direct Examination

By Mr. Orrick:

Q. What is your business?

A. Real estate agent.

Q. Where? A. 207 North Eighth street in this city.

Q. What is your firm? A. Grether & Boeck.

Q. How long have you been in the real estate business in this city?

A. Twenty-one years on the first of May last.

Q. Are you familiar with the value of property say from Eighteenth street or the Union Depot grounds west toward Forest Park? A. Generally, yes sir.

Q. Have you considered recently with Mr. Pitzman or others, the value of a certain strip of ground as indicated by the plat here from Tayon avenue on the east thirty feet

183 wide running west as indicated by the dotted lines to the east end of Forest Park?

A. Yes, sir; that is we did not go over the ground, but I have been over the ground, most of it.

Q. You were familiar with it, having sold and bought property there at different times?

A. Yes, sir; at different points on the line.

Q. Please state to the Master what in your opinion is the present value of that strip of ground as indicated upon Chart A by the dotted line, thirty feet wide extending from Eighteenth street to the east line of Forest Park?

A. The estimate that we put upon it, Mr. Jones, Mr. Pitzman and I, was about $265,000.

Q. Is that the present value?

A. That is the present value; yes, sir.

Cross Examination

By Mr. Hough:

Q. How long were you and Mr. Pitzman and Mr. Jones in making the estimate?

A. Probably about an hour.

Q. Since the adjournment of court?

A. We went at it this morning. We were spoken to about it yesterday afternoon.

Q. About an hour?

A. An hour or an hour and a half.

Q. Do you know what it cost the railroad company to get that? A. No, sir.

Q. Do you know what damages they paid to the adjacent property owners? A. I do not.

Q. Was that estimate of $265,000 based on the price of lots and of what size?

A. We based our estimate upon these facts. We assume a lot of the depth of 125 to 150 feet, unimproved without any improvements whatever, to be worth so much per front foot
184 and take about one-fourth of the property to make the difference in the price, the corners are occasionally higher, and then damages to the lot by reason of making it shallower than usual.

Q. What is the estimate of the value of the lots clear all the way through, $1,065,000?

A. That is the footing that Mr. Pitzman made. I have mine here. It is not quite that but it is very near it, though.

Q. You do not know about the improvements on the property when taken? A. No, sir.

Q. This estimate of yours is a part from what is on it now, the side tracks and railroads, just the naked lots?

A. Yes sir, just as though the ground were all vacant.

Q. If that ground were all vacant all through there now and no railroad there is it your opinion that the Wabash Company or any other railroad company could get a strip through there for $265,000?

A. That I could not tell, I think that would be about what it would be worth.

Q. That is what the land would be worth?

A. Yes sir.

Q. Estimating it in lots in the way you stated?

A. Yes sir.

Q. Don't you think that if the railroad company had to buy it through there they would have to pay more than $265,000 for that strip?

A. The probability is they could not buy it. They would have to buy the whole lot in nearly every case.

Q. And if they had to condemn it they would have to pay damages on either side?

A. If any damage was done very likely they would.

185 Q. Do you know what the Frisco people have had to pay to get into the Union Depot here recently?

Counsel for the Intervenor objects to the question.

Q. Do you know the value of the lots where they come in?

A. They come in on the south side.

Q. It is somewhat the same character of ground; you are familiar with the ground? A. Yes sir.

Q. Do you know what they paid?

A. I do not know the total amount.

Q. Do you know what they paid in any instance a front foot?

A. I could not say. I gave an opinion before the Commissioners as to the value of some of it. I could not tell what they allowed.

Counsel for the intervenor produces the agreement of the consolidation of the Wabash Railway Company with the St. Louis, Kansas City & Northern Railway Company under the name of the Wabash, St. Louis & Pacific Railway Company, filed with the Secretary of State on November 10, 1879, and the resolution of the stockholders of the Wabash Railway Company and of the St. Louis, Kansas City & Northern Railway Company, approving the agreement of consolidation of said companies, filed November 10, 1879.

I certify that the above is the transcript of testimony taken in the above entitled case, as furnished me by the stenographer, and I believe it to be correct.

GEO. H. SHIELDS,
Master, p. h. v.

July 24th, 1886.

186 In the Circuit Court of the United States, for the Eastern District of Missouri.

City of St. Louis, St. Louis, Kansas City and Colorado R. R. Co., Intervenors in case of Central Trust Company of New York et al., Complainants,
Nos. 2357 and 2464. vs. In Equity.
Wabash, St. Louis and Pacific Railway Company et al., Defendants.

Consolidated Cause.

To the Honorable David J. Brewer, Circuit Judge of the United States Circuit Court, Eighth Judicial Circuit:

I have the honor to report in the above entitled matter as follows:

In accordance with the order of reference herein, I have heard testimony, which was taken down by a stenographer, and reduced to writing and is herewith returned, together with all the exhibits therewith connected. The receivers counsel asked and were granted leave to file an answer herein, but upon reconsideration they declined to do so, and the matter was heard on the bill.

Treating the matter as an application for a preliminary injunction, as if on bill and affidavit and counter affidavit, and understanding the reference to be for the purpose only
187 of information to your Honor, and following the terms of the order, that I should set forth the facts as well as my conclusions of law on the bill, I have deemed it more logical to set out the same under the following heads, and in the following order;

First: Is the Wabash, St. Louis and Pacific Railway Company bound to permit the use of its track and right of way by other railroads from the north line of Forest Park to Eighteenth Street, (the Union Depot) in the City of St. Louis?

Second: Is the St. Louis, Kansas City and Colorado Railway such a railroad as is contemplated in the contracts in controversy?

Third: If the intervenor is entitled to use the Wabash right of way and tracks, what would be a fair and equitable compensation for the use thereof?

Fourth: Under what rules and regulations should the use be enjoyed, if granted?

Fifth: Are the intervenors entitled to a mandatory injunction in limine?

And in treating the matter in this order, I shall endeavor to give the facts as well as my conclusions of law as presented by the contending parties, under each head respectively.

I.

The General Assembly of the state of Missouri in 1874, by an Act approved March 25th, 1874, found in the session Acts of the state of Missouri, Adjourned Session, 1874, page 371, established a public park "for the people of the county of St.

Louis, to be called Forest Park," which lies west of the
188 city of St. Louis and contains 1372 acres; giving the County Court of St. Louis County the authority to purchase or condemn lands for that purpose. Section Three contains this proviso; "provided that nothing in this Act shall prevent the St. Louis County Railroad from using and occupying a right of way of the width of not more than seventy feet through the northeastern portion of said Forest Park. Said railroad shall only enter the park through Duncan's sub-division on the east side of said park, and running westerly on the north side of the River Des Peres, shall pass out of said park at a point on the northern line thereof east of Union Avenue. And provided further, that no switch or siding shall be constructed by said railroad company in said park, nor shall more than one depot be established in said park, and that shall be for passengers only. And provided further, that the grade of said railroad as far as the same runs through said Forest Park shall be approved by said Park Commissioners." The County Court was authorized to issue bonds to the County, and to raise the money to pay the same by taxation, with which to pay for said park. Section Seven provided for a Board of Park Commissioners, and that "said Board shall have power to lay off, improve, adorn and generally govern and control the use of said park, and the avenues surrounding the same, and this Board shall appoint and dismiss all officers and agents, prescribe their powers and duties, and make agreements, rules and regulations therefor." The bill in this case avers that prior to the 11th day of August, 1875, the St. Louis County Railway Company was the owner of a right of way through said park,
commencing at a point on the north side of said park,
189 where Union avenue intersects said park, running in a south-easterly direction through said park to the eastern line of the same, thence in the same direction to said Eighteenth street in the city of St. Louis at said Union depot.

It appears from the evidence of Andrew McKinley (p. 33), that there was a great deal of discussion, and that there was quite a controversy about where the road should run under the proviso above quoted, which lasted several weeks. Mr. McKinley further testifies (p. 33) that the proviso was intended to protect the park against the invasion of all railroads, unquestionably; I put it there myself. The evidence does not show how the St. Louis County Railroad acquired its right of way through the park, but a fair inference from the testimony and the proviso in the act, is, I think, that it acquired a right of way before the passage of the act. On the 11th day of August, 1875, there was an agreement made between the St. Louis County Railroad Company, and the St. Louis, Kansas City and

Northern Railway Company, which is attached to the bill as Exhibit "A." On the same day another contract was made between the Commissioners of Forest Park, the St. Louis County Railroad and the St. Louis, Kansas City and Northern Railway Company, which is attached to the bill as Exhibit "B." Which latter agreement in the 12th Article thereof, refers to the first mentioned agreement. And on the same day the St. Louis County Railroad Company made a deed to the St. Louis, Kansas City and Northern Railway Compay, of its right of way through the park and to Eighteenth Street, in the city of St. Louis, so far as it had acquired it, which deed recites that it

"is made in pursuance of the terms of a certain contract
190 made and executed by and between the parties of the first and second parts hereto, and dated August 11th, A. D. 1875." The evidence shows the right of way thus sold was not continuous, but over property separated by considerable distances, (See Chart A).

Speaking of this tripartite agreement between the two railroads and the Board of Forest Park Commissioners, the testimoney of Andrew McKinley (p. 32) shows that the St. Louis, Kansas City and Northern Railroad, "had not acquired any right of way through the park up to the time of this agreement, that all of the covenants in it were in consideration of the right of way." A consideration of these agreements and this deed is necessary in order to determine the main point in this controversy. The contract between the St. Louis County Railroad Company and the St. Louis, Kansas City and Northern Railway Company recites that the former "had acquired the title or right of way over certain pieces of land designated on Chart A, which is in evidence, and that the St. Louis, Kansas City and Northern Railway Company for the purpose of reaching the Union Depot in the city of St. Louis, Mo., and other purposes, desiring and requiring a right of way and real estate necessary to establish and maintain its route thereto, forever, over a part of the right of way and real estate of the St. Louis County Railroad, as well as over the lands of others, and having the power under the laws to acquire a right of way along its said established route, either by purchase, condemnation or otherwise, and along and over the lands of the party of the first part, or others, and through Forest Park, as well as outside thereof," and desiring "an amicable adjustment of all differ-

ences and conflicting claims and rights; therefore, the
191 parties, each for itself, it successors and assigns, do covenant, promise and agree as follows:" then follows the contract by which the St. Louis County Railroad Company agrees "to sell to the St. Louis, Kansas City and Northern Railway Company, out of the lands owned by it and designated

on said Chart A, a strip twenty-eight feet in width from the blacksmith shop at the junction of the Olive Street Road and the old Bonhomme Road in St. Louis County, to the northern line of said Forest Park. Also a strip twenty-eight feet wide from the eastern line of Forest Park to the western limits of the city of St. Louis. Also a strip thirty feet in width from the said city limits to Tayon Avenue or Eighteenth Street, in the city of St. Louis, and also "an undivided one-half of all the right, title and interest of the party of the first part of, in or to the right of way and of, in or to any and all other rights, privileges, franchises, powers and immunities owned by or vested in or enjoyed by or that may hereafter be acquired, owned by, vested in or enjoyed by the St. Louis County Railroad, in, through or upon Forest Park, by any means or from any source whatever." This contract also contains the following provision: "to have and to hold all and singular, said lots, rights of way, and other property, unto said party of the second part, (St. L. K. C. & N. R. R.) its successors and assigns, forever; and all the rights, privileges and franchises, powers, immunities, improvements and appurtenances thereto belonging or in any wise appertaining." The contract further provides that the St. Louis, Kansas City & Northern Railroad should permit the trains of the St. Louis County Railroad Company to pass through a tunnel and cut to be made by
192 the St. Louis, Kansas City and Northern Railroad, extending from the eastern line of said park, under the same regulations, etc., as agreed upon in the contract concerning trains in said park and elsewhere; and provided further, that the use and enjoyment of the rights, privileges and franchises, etc., through and upon Forest Park, and in and through and upon said proposed tunnel and cut, should be commonly and jointly used by the parties thereto, their successors and assigns. The contract also provided that at two other points, to-wit: Compton Avenue and Tayon Avenue, that the St. Louis County Railroad should have the right to lay one rail if necessary, on the property conveyed by it to the St. Louis, Kansas City and Northern Railroad. For and in consideration of the covenants in said agreements contained, the St. Louis, Kansas City and Northern Railroad were to pay to the St. Louis County Railroad $125,000.00 as provided in the agreement. The agreement further provides as follows: "Whereas, under this agreement and a certain agreement between the parties hereto and the Commissioners of Forest Park, of even date herewith, the party of the second part (i. e. St. L., K. C. & N. R. R.) is about to, and hereby in consideration of the covenants of the party of the first part hereinafter particularly set forth, and of the covenants and agreements of said Commissioners of Forest Park, in said agreement with them contained,

does covenant and agree to construct and maintain a railroad bed and road in, upon and through said Forest Park and the tunnel and cut hereinbefore specified, according to certain plans and cut hereinbefore specified, according to certain plans and specifications agreed upon, and according to the terms and conditions of said agreement with said Com-
193 missioners for the joint use of both parties hereto, their several successors and assigns." In consideration of all the premises and as an inducement to said party of the second part (i. e. St. L., K. C. & N. R. R.) to proceed with said construction and maintain, &c. the St. Louis County Railway Company agreed to pay to the St Louis, Kansas City and Northern Railroad within two years, one-half of the actual cost of the construction of said road-bed, through said park and said tunnel and cut; unless it should decline to do so, and deliver to the St. Louis, Kansas City and Northern Railroad a deed granting to it and its successors and assigns "all rights and titles, etc., it may have in said road-bed, road or property in said park, tunnel and cut, free from incumbrances," and if said election should not be made within the time specified, the St. Louis County Railway Company agree to pay, in addition to the one-half cost of construction, one-half of the actual cost of maintaining the said road-bed, etc., and it was further covenanted, that if the St. Louis County Railway Company, its successors and assigns should fail to make such payments on demand after due, etc., "then all the rights, privileges, franchises, powers, immunities, improvements and property of said party of the first part, (i. e. St. L. County Railway) in, through or upon said Forest Park, and into, through or over or upon said tunnel and cut, shall become, by virtue and force of said failure and refusal, without further process or proceedings forfeited, and belong to said party of the second part, its successors and assigns," and the St. Louis, Kansas City and Northern Railroad was thereupon "authorized and empowered to at once enter upon the sole and absolute
194 possession and enjoyment of all said rights, privileges, franchises, powers, immunities, improvements and property, to the exclusion of said party of the first part, its successors and assigns, "and the said St. Louis County Railway Company further bound itself under such circumstances, to convey all its rights, etc., by deed. And it was further covenanted, that the St. Louis County Railroad might elect, within two years, to lay a third rail for a narrow gauge track through said park, tunnel and cut, in a manner not to interfere with the running of said trains of the St. Louis, Kansas City and Northern Railroad.

The counsel for the Receivers admitted that the St. Louis County Railway built no track or railroad between Eighteenth

Street and the north line of Forest Park; that it never built or operated any railroad at all, and that it failed or refused to pay on demand to the St. Louis, Kansas City and Northern Railroad, or the Wabash, any part of the cost of construction of its railroad through the park or elsewhere, (pp. 60-61). It is evident that under the contract now under consideration, by reason of such failure to pay, that all the rights, privileges, etc., of the St. Louis County Railway in, through and upon Forest Park, and in, into, through, over, or upon said tunnel or cut, became the property of the St. Louis, Kansas City and Northern Railroad Company. The counsel for the Receivers claim that the legal effect of this contract is an agreement on the part of the St. Louis County Railway Company to convey a part of certain property which it then owned to the St. Louis, Kansas City and Northern Railroad Company, and that in the tunnel and cut through the park and at the
195 points of Compton Avenue and Tayon Avenue both roads should have the right to a joint and common use of the right of way, but that this contract between the parties did not extend beyond the joint use mentioned and must be confined practically to an agreement for the joint use of the road through the park, the tunnel and cut, and no further. It is evident that by virtue of the payment of the $125,000 and the other considerations, the St. Louis, Kansas City and Northern Railroad obtained an undivided one-half of the interests of the St. Louis County Railway through the park, and that the St. Louis County Railway reserved the right to use certain other portions of the road jointly with the St. Louis, Kansas City and Northern Railroad, provided it elected to pay one-half of the cost of the construction thereof. It is also evident that by the failure to so elect and to so pay, that all of the rights reserved to the St. Louis County Railway Company by agreement, passed to and became absolutely the property of the St. Louis, Kansas City and Northern Railroad. The construction contended for by the Receivers' counsel might be perhaps correct, considering this agreement between the two roads by itself; but it refers to and practically makes a part of that agreement, the agreement between the Commissioners of Forest Park and the two roads, made on the same date, and it must be observed that the St. Louis, Kansas City and Northern Railroad agrees to build its road through the park and tunnel and cut, not only in consideration of the covenants and agreements of the St. Louis County Railroad but of the covenants and agreements of the Commissioners of Forest Park in said agreement with them contained.

196 We must therefore examine in connection with this agreement the tripartite agreement between the park commissioners and the two roads in order to ascertain the intention of the parties.

This tripartite agreement is quite lengthy and minute in its details as to construction and management of the road, but it will not be necessary to examine critically the whole of said agreement. The first paragraph provides that "the Forest Park Commissioners in consideration of the relinquishments and agreements and stipulations hereinafter contained on the part of the party of the second part (i. e. St. L. County Railway) do hereby accept and approve the line and grade of said railroad as laid down and described upon the plat and profile hereto attached, and forming a part of this agreement, and said line and grade in case there is no forfeiture of this agreement, is hereby fixed as the sole and finally established right of way to which said party of the second part is entitled by statute or otherwise through said park or any part thereof, and the width of said right of way, as established by statute, is hereby reduced from seventy feet and fixed at forty-two feet between its outer points," etc., etc. The St. Louis County Railroad, in the next paragraph of the contract relinquished twenty-eight feet off the seventy feet established by statute for its right of way through Forest Park, except in case of forfeiture, when the party should be restored to their rights as if the agreement had never been made. What is meant by "the right of way established by statute" is difficult to understand, as the proviso in the Forest Park act hereinbefore quoted says,

197 "that nothing in this act shall prevent the St. Louis County Railway Company from using and occupying a right of way of the width of not more than seventy feet through the northeast portion of said Forest Park." This proviso neither established a definite line nor a definite width of right of way, but permits the St. Louis County Railway to use and occupy a right of way through a portion of the park within certain limits, not to exceed seventy feet in width. No other statute than this has been called to the attention of the Master.

This agreement has attached to it two plats; one showing "the alignment of the St. Louis County Railway through Forest Park," and the other showing "a profile of the St. Louis County Railway through Forest Park, showing grades as adopted June 8th, 1875." This profile shows heavy excavation work and also heavy embankment work throughout nearly the entire line through the park. The Master is of the opinion that the legal effect of the Forest Park act, and of the first two paragraphs of the tripartite agreement, is for the first time definitely to establish the line and grade of the St. Louis County

Railway Company as contemplated in the Forest Park act, and must be taken as a settlement between the Park Commissioners and the St. Louis County Railway of its rights under the proviso in the Forest Park act. If this be true, it necessarily follows that the line and grade of said railroad became the property of the St. Louis County Railway Company subject to all of the conditions and limitations contained in said tripartite agreement. The first, second, third, fourth, fifth, sixth, seventh, and eighth provisions of this tripartite agreement provided for the details of constructing the road through the park as well as beyond the park. The
198 ninth Article of said contract is in the following words; "and said party of the second part (i. e. St. L. Co. R. R.) shall permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park and up to the terminus of its road in the city of St. Louis, upon such terms and for such fair and equitable compensation to be paid to it therefor, as may be agreed upon by said companies." By the Tenth Article, the St. Louis County Railway concedes that its right of way through the park is not exclusive, nor to be considered to limit the power of the Park Commissioners to grant a right of way to other railroads in other portions of the park. The Eleventh Article provides that the agreement on the part of the two railroad companies shall, within a reasonable time, as soon as practicable, be ratified by a majority of the stockholders of said railroads. The Twelfth Article recites "that for the purpose of enabling the St. Louis, Kansas City & Northern Railroad to reach the Union Depot at St. Louis, Mo." an amicable arrangement for a right of way outside of and through Forest Park was made between the two railroads, and in pursuance thereof they are to "enter upon and enjoy the right of way and all the rights, privileges, immunities, powers, improvements and property belonging to or vested in or that may belong to or be vested in the party of the second part (i. e. St. L. County Railway Company) in common, in and upon and through said park under certain regulations, terms and conditions agreed upon by and between said parties, and that as the St. L., K. C. & N. R. R., in further pursuance of said last named agree-
199 ment, was about to construct a railroad through the park, etc." Now, therefore, in view of the premises and as inducements to said party of the third part ("to wit: the St. Louis, Kansas City & Northern Railroad") to proceed as intended, the party of the first part ("to wit: the Board of Forest Commissioners,") does hereby grant and convey unto and license and permit the said party of the third part, its successors and assigns to have, hold and use and enjoy said right of way in, upon and through said park in common with, and

to be held and enjoyed jointly with said party of the second part and its assigns on the terms of the said contract between them, and under the same terms and conditions as are hereby and hereinbefore imposed upon said party of the second part," (to wit: the St. Louis County Railway Company,) and which are hereby assumed by said party of the third part, (to wit: the St. Louis, Kansas City and Northern Railroad Company,) "as to improvements except as to building a depot and switch in said park, which the party of the second part is to do itself, or in case said party of the second part, its successors or assigns, should forfeit its said rights, privileges and franchises in, upon and through said park, or from any cause cease to have, maintain or enjoy the same, then it is hereby agreed and covenanted that the party of the third part (i. e. St. L. K. C. & N. R. R.) shall not also be excluded from said park, but shall, with its successors and assigns, continue to have, maintain and enjoy all of said rights, privileges, immunities, franchises, improvements and property on the terms hereinbefore set forth continuously and forever."

Four things must be observed about this Twelfth Article; first, that it was for the purpose of enabling the St. Louis, Kansas City & Northern Railroad to reach the Union Depot; and, second, to enjoy jointly with the St. Louis County Railway the rights and privileges obtained by it from the St. Louis County Railway; and third, that in the event of a forfeiture of the rights and privileges and franchises of the St. Louis County Railway, that the forfeiture should not affect the St. Louis, Kansas City & Northern Railroad, but that all of the franchises should immediately pass to and be enjoyed by the St. Louis, Kansas City & Northern Railroad; fourth, that the St. Louis, Kansas City & Northern Railroad regarded the license and consent of the Board of Park Commissioners necessary for it to accomplish these objects. As the twelfth provision carefully provides for these objects "under the same terms and conditions as are hereby and hereinbefore imposed upon said party of the second part," and again, the latter part of the clause confers the entire privileges on the St. Louis, Kansas City & Northern Railroad "on the terms hereinbefore set forth" the evident intention and agreement of the parties was that whether the roads used the right of way jointly, or whether it should pass to the St. Louis, Kansas City and Northern Railroad, and its successors and assigns, that it should be burdened with the limitations set forth in the contract, and especially with the limitations contained in the ninth section as to permitting other railroads to use its right of way through the park and to the Union Depot. The counsel for the Receivers contend that as the words "under the same

terms and conditions as are hereby and hereinbefore imposed upon the said party of the second part are followed by the words "and are hereby assumed by the said party of the
201 third part as to improvements except as to building a depot, etc., that the evident intention of the parties was, that the St. Louis, Kansas City and Northern Railroad was only bound to make the improvements which it agreed to make in the contract between it and the St. Louis County Railway Company, and that this construction excludes the ninth article of the tripartite contract as a condition. The Master does not agree to this construction, for the following reasons: first, that it was unnecessary for the St. Louis, Kansas City and Northern Railroad to expressly assume any of the conditions; if it accepted the license and grant and use of the right of way, it could only do so, subject to the conditions imposed. Second, if this construction is correct, then the fourteenth section of the contract was entirely unnecessary, as it provides in detail in regard to the subject of improvements. My construction of the words "as to improvements" in the twelfth section, is this: that the Park Commissioners granted the franchises and privileges to the St. Louis, Kansas City and Northern Railroad "under the same terms and conditions as are hereby and hereinbefore imposed upon" the St. Louis County Railway Company. Among these terms and conditions was the obligation on the part of the St. Louis County Railway to build a depot and switch in the park and by the contract between the two railroads, the St. Louis, Kansas City and Northern Railroad was to immediately construct its railroad through the park, tunnel and cut, etc., and that in assuming the terms and conditions imposed upon the St. Louis County Railway Company it wishes to except as to improvements the building of said depot and switch in said park.

202 This view is strengthened by the fact that in the latter part of the twelfth article, when providing for the entire franchise to become vested in the St. Louis, Kansas City and Northern Railroad "on the terms hereinbefore set forth, continuously and forever," there are no exceptions of any kind. If, in addition to this, we remember that the only thing which the St. Louis, Kansas City and Northern Railroad Company had to do immediately was to construct its railroad, that was the only thing it had then to assume, and in so doing, it properly accepted the building of the depot and switch which was part of the improvements.

The Fourteenth Article of this tripartite contract refers to the contract between the two railroads of even date, and recities that by that contract the St. Louis, Kansas City and Northern Railroad has agreed that it will execute, perform and

comply with all the terms, provisions and things herein to be done, etc., by the St. Louis, County Railway Company "as to said improvements, except the depot and switch in said park," that therefore the Board of Park Commissioners accepts the contract of the St. Louis, Kansas City and Northern Railroad to comply with the covenant as to improvements except as aforesaid, in lieu of the said St. Louis County Railway, releases it from its obligation, and agrees to take a compliance by the St. Louis, Kansas City and Northern Railroad as a compliance by the St. Louis County Railway Company.

It will be further noticed, that by this tripartite agreement, the Board of Forest Park Commissioners agrees to do at its own expense certain work connected with the building of said railroad through said park.

203 It appears from the testimony of Andrew McKinley, the President of the Board of Forest Park Commissioners, that the Board contributed $39,000.00 or $40,000.00 towards the construction of the road through the park, in building a bridge and culverts, and building walls on each side of the track (pp. 31-34-35); which expenditures would not have been necessary except for the building of the railroad (pp. 35-38-39).

It also appears from the testimony of Andrew McKinley, that the invasion of the park by railroads would have had a very damaging effect upon the park (p. 33). That there was great apprehension of danger to persons visiting the park on account of the railroad (p. 34). That the contract was intended to protect the park and to provide for a contingency it doubled the capacity of the track, to provide for more trains passing through and that therefore they conceded more ground than was necessary and gave the roads a right of forty-two feet (p. 36); and that all points in issue between the parties was settled by the contract (p. 37).

Referring to the deed from the St. Louis County Railway Company to the St. Louis, Kansas City and Northern Railroad Company, which recites that it was "made in pursuance of the contract" heretofore set forth as being made between the two railroads, after the conveyance of designated tracts of land, and contains the following clause: "and also the said party of the first part hath conveyed, assigned and transferred, and by these presents doth convey, assign and transfer unto the said party of the second part, (St. L. K. C. & N. R. R. Co.) and to its successors and assigns, an undivided one-half of all the right, title and interest of the party of the first part of,
204 in or to the right of way, and of, in or to any and all other rights, privileges and franchises, powers and immunities owned by or vested in, or enjoyed by, or that may here-

after be acquired or owned by, vested in or enjoyed by the party of the first part, in, through or upon Forest Park by any means, or from any source whatever. All of which conveyances of the said rights of way in this deed mentioned are made subject to the terms and conditions upon which the same were granted to the party of the first part: As one of the terms on which the right of way through the park was granted to the St. Louis County Railway Company, was that it should permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use this right of way through the park, and up to the terminus of its road in the city of St. Louis, "upon such terms and for a fair and equitable compensation to be paid to it therefor, as may be agreed upon by such companies," the Master is of the opinion that taking into consideration the condition of the parties, the objects sought to be accomplished, and the terms of the contract between the two railroads, and the terms of the tripartite agreement between the Park Commissioners and the two railroads, and the deed from the St. Louis County Railway Company to the St. Louis, Kansas City & Northern Railroad Company, that the intention of the parties was that there should be but one right of way for railroads through the Park, which should be subject to the common use, not only of the two contracting railroads, but such other railroads as might afterwards desire to pass through the Park, and that in order to prevent other railroads from attempting to pass through the park and destroy it for the purpose for which it was
205 established, the Board of Park Commissioners wisely required, and the railroad companies assented to the conditions that they would take said right of way subject to the right of user by other roads, not only through the Park, but up to the terminus of its road in the city of St. Louis (i. e. Eighteenth Street). If the right beyond the Park into Eighteenth Street to use this right of way had not been reserved for other roads by the Park Commissioners, it would have been, and would be impossible to prevent the Park from being marred or destroyed by other roads. But if the Park Commissioners or the City of St. Louis are able to say to other roads wishing to pass through the Park and enter the City of St. Louis, "you shall do so on reasonable terms on the right of way already established through the Park and thence to the Union Depot," no complaint could be made by the entering road and the interests of the park and the city of St. Louis would thus be better protected.

It is conceded that by the Scheme and Charter declared adopted in 1877, that this park and the control thereof and the powers conferred upon the Park Commissioners, passed to and were vested in the City of St. Louis.

It appears in evidence (p. 62) that the St. Louis, Kansas City & Northern Railroad Company on the 11th day of November, 1879, was consolidated with other companies under the laws of this State and other States, and became the Wabash, St. Louis & Pacific Railway Company. The bill avers that on the ..... day of ..... 1879, the said St. Louis, Kansas City & Northern Railroad Company then in exclusive possession of said right of way and railroad, duly assigned, conveyed and transferred all its property, rights and
206 franchises of whatever nature to the defendant the Wabash, St. Louis & Pacific Railway Company, and since said date the latter company has used, enjoyed and operated all the property formerly owned by said St. Louis, Kansas City & Northern Railroad Company, including the said railroad from said Union Avenue to said Eighteenth Street, and now is in the exclusive possession and enjoyment thereof.

The counsel for the Receivers admit that this allegation is true; and that it was acquired on the 11th day of November, 1879 (p. 74).

It also appears in evidence that the limits of the city of St. Louis have been extended and now include the whole of Forest Park.

The counsel for the Receivers contend that if these papers bear the construction put upon them by the counsel for the intervenor, that the Wabash Railroad Company is not bound by them. That the covenant contained in the ninth article of the tripartite agreement is a mere personal contract of the St. Louis County Railway Company, and that it does not run with the land, and that therefore the assignee is not bound by the covenant. That such a covenant cannot be annexed to things not granted, and that as the Park Commissioners could only grant a right of way through the park, that they could not annex a covenant requiring the St. Louis County Railway Company to permit the use of its tracks east of the park into the Union Depot, and cites the case of Kepler vs. Bailey, 2 Miln. and K. 517. Narcross vs. James, Am. Law Register, 1886, p. 64. Spencer's case, 5 Coke, 16. The Master is of the opinion, that these cases do not apply to the case under consideration for the following reasons; first, the St. Louis, Kansas City and Northern Railroad cannot be considered
207 under the circumstances simply the assignee of the St. Louis County Railroad as to this property, but was an original contractor, having signed the tripartite agreement, as a party thereto, and it obtained whatever rights it had through the park by virtue of that contract. Second, if the St. Louis, Kansas City and Northern Railroad should be considered as taking the property solely by virtue of its contract

with the St. Louis County Railroad and by virtue of the deed from the latter road, we find that the whole of the property conveyed to it by the St. Louis County Railroad, (that through the park and that outside of the park), was conveyed "subject to the terms and conditions upon which the same were granted to the party of the first part," this being a covenant in the deed itself, limiting the estate taken by the St. Louis, Kansas City and Northern Railroad.

In the brief filed by the counsel for the Receivers he cites a case where A being the owner of a block of ground grants a portion of it to B, upon condition that neither B, his heirs or assigns, will permit a livery stable or brewery to be erected on the lot conveyed. He then says "B takes only a qualified estate in the premises; his dominion over the property is not complete, and not being able to convey any greater estate than he received his heirs and assigns necessarily take subject to the conditions on which he held." Now, by virtue of the deed from the St. Louis County Railroad Company to the St. Louis, Kansas City and Northern Railroad, it took all of the property through the park and this side of the park from the St. Louis County Railroad subject to the conditions on which it was conveyed to the latter road, and one of these con-
208 ditions was, so far as the park and up to the Union Depot was concerned, that it should permit other roads to use its right of way through the park and to the Union Depot. Another view strengthens this position in my opinion the St. Louis, Kansas City and Northern Railroad now holds the entire franchise through the park and through the tunnel and cut and through the points reserved on Tayon Avenue and Compton Avenue by virtue of forfeiture, on account of the nonpayment of one-half of the cost of construction by the St. Louis County Railroad, and so far as the park is concerned it gets the benefit of this forfeiture by virtue of its original contract with the park commissioners, subject to the ninth section of the tripartite agreement.

Although the right of way conveyed by the St. Louis County Railroad through the park and to Eighteenth Street was not continuous, but in separate parcels, it was contemplated by all of the parties that the intervening ground would be obtained by the railroads and constitute a continuous right of way for railroad purposes, and all of the covenants of the contracts and deed were made with that understanding and really to effectuate that purpose, and the contracts and the deed are so interlaced with each other as to require the consideration of all of them in the construction of any. Such being the case, the Master is of the opinion that the right of way from the north line of the park into the Union Depot must be considered as

the subject matter under consideration by the parties and ought to be treated as one whole.

209 Under the Consolidation Acts of the State of Missouri, sections 789 and 790, Rev. Stat. Mo., 1879, consolidation between railroads is permitted to be made conferring on the consolidated road "all the powers, rights, privileges and immunities, and subject to all the obligations and liabilities to the State or otherwise which belonged to or rested upon either of the companies making such consolidation." As the Wabash road, according to this record, acquired the rights of the St. Louis, Kansas City and Northern Railroad by consolidation, it took its property subject to all the obligations and liabilities of the latter company to the State or otherwise; that is, all the liabilities and obligations of every kind to which it was subject. One of these liabilities, according to my construction of the agreements herein, was the privilege for other roads to use its right of way through the park and up to the terminus of its road at Eighteenth street upon fair and reasonable terms.

The relation between the St. Louis, Kansas City and Northern Railroad and the Wabash Railroad is different from that of a purchaser by deed. All obligations and liabilities of the former road are by law imposed upon the latter, not only covenants running with the land, but personal covenants. The changed relations in the consolidating roads does not affect the obligations of any one of them in its relations to the State or outside parties. If the St. Louis, Kansas City and Northern Railroad, as an original contractor, became subject to the ninth article of the tripartite contract, then by consolidation the Wabash became subject thereto under the statute, and cannot claim that "as assignee" it is not bound by all the cove-
210 nants of the former, even though they be held merely personal covenants.

Having thus given the facts and my conclusions of the law on the contract relations of the parties to this bill, I am of the opinion that under the facts and the law, the Wabash Railroad Company holds its right of way through the park and to the Union depot, subject to the rights reserved by the Park Commissioners for the benefit of the citizens of St. Louis and the public, that other railroads should use this right of way upon reasonable rules and regulations and for fair and equitable compensation.

II.

Is the St. Louis, Kansas City and Colorado Railroad such a railroad as is contemplated in the contracts in controversy, and is it entitled to avail itself of the right to run over the Wabash tracks?

The articles of organization of the St. Louis, Kansas City and Colorado Railroad have not been offered in evidence. The evidence of S. T. Emerson, the civil engineer of that road, shows that this road has a track laid from Forsyth Junction, to beyond Creve Coeur Lake, in St. Louis county, and a branch this side of the lake; in all, about twenty-one miles of track. In addition, they have in St. Louis and Franklin counties ten miles of completed grade, and a force working on the balance, and several miles of completed grade in Kansas from the city of Fort Scott this way, and a contract let from Fort Scott towards St. Louis of about twenty-five miles, which is now being worked. That they expect to complete by November next their road to Union in Franklin Conty, about 54½ miles; that the road between Forsyth Junction and Creve Coeur Lake is
211 now ready for operation (pp. 17 and 18). That they have graded three miles of the road in the State of Kansas from Fort Scott in the direction of Clinton in the State of Missouri (p. 25). The road is contemplated to run through St. Louis County, Franklin, Gasconade, Osage, Maries, Miller, Cole, Morgan, Benton, Henry, St. Clair, Bates and Vernon Counties in the State of Missouri, and in Bourbon County in Kansas, and then southwesterly to the southern tier of counties in the State of Kansas, and then directly west through the southern tier of counties (p. 26). That they have expended for work in Missouri about $300,000.00 (p. 27). That the profile map of the intended line has been filed in St. Louis County and Franklin County in Missouri, and in Bourbon County in Kansas (p. 27). That they have out surveying parties west from Union towards Fort Scott, sixty miles, and have surveyed the road from Bourbon County east to Clinton, sixty-five miles. That they have no actual location to any extent west of Fort Scott, Kansas (p. 28). That the reason they have done more work at the Missouri end than elsewhere was because of conflicts with the Missouri Pacific attempting to take their right of way (p. 29).

It seems to have been conceded by both parties that the corporation was organized under the Kansas laws. The Receivers' counsel object that because this road has no constructed and operating railroad in the State of Kansas, that it cannot come into the State of Missouri, and claim the benefit of this contract with the Wabash. It has been decided that a defacto railroad corporation may exercise a right of eminent domain, and as a rule the legal existence of a defacto corporation can be
212 questioned only by the State in a direct proceeding for that purpose.

Brookville vs. McCarty, 3 Indiana, 892.
A. & C. R. Co. vs. City of Lawrenceburg, 56 Indiana, 80.

McCauley vs. R. R. Co., 83 Ills. 348.
Reisner vs. Strong, 24 Kansas, 410.
Catholic Church vs. Tobbein, 82 Mo. 418.

It has been held in Missouri that a railroad organized under the laws of Arkansas, under section 790, Rev. Stat., 1879 (passed in 1870,) had all the powers of a railroad company organized under the laws of this State, and could condemn land for its right of way.

Gray vs. St. L. & St. Francisco R. R., 81 Mo. 135.

In 1881 the General Assembly of the State of Missouri amended Section 790 of the Revised Statutes so that it reads as follows: "any railroad company duly incorporated and existing under the laws of any state of the United States may extend, construct, maintain and operate its railroad into and through this State and for that purpose shall possess and exercise all the rights, powers and privileges conferred by the general laws of this State upon railroad corporations organized thereunder and shall be subject to all the duties, liabilities and provisions of the laws of this State concerning railroad companies, as fully as if incorporated in this State." (See Session Acts, State of Mo., 1881, pp. 75-76.)

Section Thirteen of Article Twelve of the Constitution of the State of Missouri does not affect any right of the intervenor to avail itself of the use of the right of way as claimed in this petition. The Master is therefore of the opinion that the
213 St. Louis, Kansas City and Colorado Railroad is such a railroad as is contemplated in the contracts in controversy, and is legally entitled to avail itself of the right to use the right of way of the Wabash, St. Louis & Pacific Railway "from the north line of Forest Park to Eighteenth Street in the city of St. Louis," under reasonable regulations and terms as may be agreed and upon such terms and for such fair and equitable compensation to be paid to it therefor as may be agreed upon between said companies."

III.

If the intervenor is entitled to the use of the Wabash right of way and tracks, what would be a fair and equitable compensation for the use thereof?

The order of reference herein requires me to report a sum that would be a fair and equitable compensation for the use of the right of way and tracks of the Wabash, St. Louis & Pacific Railway Company, as prayed for in the bill of complaint. On this question there is such a conflict of testimony as to be almost impossible to arrive at a basis. The complainants'

counsel claims that the true measure of compensation is first to find the cost of the track and right of way in question, and to allow interest on this sum at the rate of six per cent per annum, the legal rate of interest in Missouri, and to add to this the cost of maintenance and then to divide this sum on a wheelage basis; that is to say, in proportion to the number of cars run by each road over said track, settlements to be made on this basis every thirty days. On the other hand the Receivers' counsel claim that a fair and equitable compensation is to value the right of way and tracks proposed to be
214 used at their present value as a railroad, to allow interest on this value at six per cent and to require the St. Louis, Kansas City & Colorado Railroad to pay one-half of said interest and to pay in addition thereto their proportion of the cost of operating and maintenance of said right of way and tracks on a wheelage basis.

In support of their theory the complainants' counsel introduced testimony of S. T. Emerson, the chief engineer who built the St. Louis, Kansas City and Northern Railroad from Ferguson through the park to the Union Depot. He stated that the cost of the whole of said branch road was $840,000.00, including the right of way and every thing, and that that portion of the road from Eighteenth street or the Union Depot to the north line of the park cost $360,000.00 (p. 9). That he had recently examined the track and that the superstructure, the ties, iron, etc., had greatly depreciated in value and that the depreciation amounted to about fifty per cent (p. 13). That the difference in the value of the track as it is now and its cost in the first instance was about $25,000.00 less on account of the depreciation, and that the superstructure originally cost about $40,000.000.

Deducting this depreciation at fifty per cent, $20,000.00, from the original cost, would leave $320,000.00. He also testifies that the cost of maintaining a mile of single track railroad, such as the Wabash, would not exceed $600.00 per mile a year. Taking this basis, four miles and 224 feet, for maintenance per year, would be about $2,400.00 (p. 16). Mr. Emerson has been in the railroad business as an engineer, partly in operation and partly in construction for 34 or 36 years, and he
215 gives his opinion that a fair and equitable compensation in a case where one railroad has a right under a contract to use the track of another, would be to divide on a wheelage basis, the interest on the first cost of the property, and the cost of maintenance (p. 16). With a settlement every thirty days (p. 20). On cross-examination he says (p. 22) that he arrived at the cost of the road by taking the amount of

money he had spent in construction, and consulting the Auditor as to the balance of the money that had been expended, but could not detail how much was for right of way, and how much for construction. He says (p. 23) that this was the cost of the road up to about July, 1876, and does not include the subsequent cost.

On the other hand Col. How, the general agent of the Receivers of the Wabash states, that (p. 91) he was connected with the St. Louis, Kansas City and Northern Railroad as secretary and vice-president, and that it was his duty to approve vouchers and keep himself posted with respect to the cost of that railroad between the Union Depot and the north line of the park, and that his recollection is that it cost betwen $1,000,000.00 and $1,100,000.00. That the whole cost from Ferguson into the Union Depot was $1,250,000.00, and that a liberal estimate of the cost from the north line of the park to Ferguson would not exceed $250,000.00 (p. 91.)

It is also in evidence that subsequent to the original building of this branch, the St. Louis, Kansas City and Northern Railroad and the Wabash road have acquired other property on which they built side tracks, switches and other things necessary for the operation of their road.

As both these gentlemen are supposed to be in a position to know the cost, and as one limits the cost to about July,
216 1876, it is possible that the difference arises from the sum spent after that date.

In regard to the present value of the railroad there is the same conflict of testimony. Col. Talmage, the general manager of the road for the receivers, testifies that some time ago at the request of the C., B. & Q. road for an entrance into the city over these tracks, he had his engineer go over the value and costs of the property and get up the figures, and went over the same with him, and that he considered the present value of the property to be between $1,250,000 and $1,500,000, and he based this estimate upon the property having been purchased some time ago, and without the improvements with which a similar right of way, parallel, would be burdened. He states (p. 77) that he would consider a fair valuation of the right of way and superstructure of the Wabash Railroad from the north line of the park to the Union Depot with such appurtenances as are necessary to operate it as a railroad in the city of St. Louis, side-tracks, etc., to be worth at least $1,500,000 (p. 77). He says (p. 80) this valuation includes the property between the west line of the park and Union Depot; that is the real estate and tracks, the side-tracks laid thereon, and other appurtenances necessary for doing business. He states

(p. 82) that the reason the whole property should be taken in the value is that you cannot do business without the sidings, switches, etc., for the purpose of storing, loading and unloading cars.

Col. How in his testimony values the line as it stands to-day including the right of way and superstructure and necessary appurtenances from the north line of the park to the Union Depot, at $1,800,000 and that if a new line were to be
217 built it would cost fully $2,500,00 (p. 91).

On the other hand the intervenor introduced Julius Pitzman, John Grether and L. B. Jones, who are generally familiar with the values of real estate in the city of St. Louis, who put the value on a strip of ground thirty feet wide as it appears on the plat Chart A, extending east of Forest Park thirty feet wide to Tayon Avenue (p. 108) at $265,141.00. This is of the real estate alone, simply considered a vacant land, level with the streets, thirty feet wide. These witnesses detailed the manner in which they arrived at this estimate, and said that it does not include anything except the actual value of the land, nor what the railroad might have paid for damages for adjoining property, nor any of the superstructure, nor improvements thereon. There was no estimate of value of the railroad as a railroad given by any one except Mr. Talmage and Mr. How.

There is quite a wide divergence between the witnesses for the intervenors and the receivers as to the method of arriving at an apportionment between the two companies. Col. Emerson states that it should be divided on a wheelage basis solely. J. B. Vandyne, who has been in the railroad business since 1855, and has been general superintendent since 1861, states that in a case where one road by contract has a right to run over the tracks of another it should be divided on the wheelage basis, taking into consideration the maintenance of the road, the interest on the cost of the road, and he gives instances (pp. 45 and 46) where this basis is adopted between roads. In answer to a question by the Master (p. 47) he states that
218 an additional element to be considered is the value of the track itself.

Charles H. Sharman, who is the superintendent of the Ills. and St. Louis R. R., in East St. Louis, and who is familiar with instances in which railroads run over the tracks of other roads, after stating instances, states that in his opinion a mode of arriving at a fair and equitable basis would be to take into consideration the value of the tracks to be used jointly, in relation to what it cost, and then agree upon a percentage to be paid on that, and add to that amount the cost of maintenance of the track and prorate that. That he would allow six per

cent on the cost, and divide the whole on the basis of wheelage (p. 50), and that he knows of no more equitable way of arriving at compensation than the wheelage basis (p. 51). In answer to a question by Judge Hough (p. 57) he states that to some extent the value of the right of way at the time the road was to be used by the other road ought to be taken into consideration.

On the other hand Col. Talmage and Col. How, who were fully as competent as railroad men as the other witnesses, state that the proper way to ascertain the equitable consideration to be paid by one road for the use of another's tracks, is to value the right of way and track and its appurtenances and to require the entering road to pay one-half the interest per annum on this valuation, and in addition thereto to pay on a wheelage basis the maintaining and operating expenses of the right of way and track. Both of these gentlemen gave numbers of instances connected with the Wabash property in which this basis has been adopted, sometimes the Wabash paying this consideration and sometimes receiving this consideration from other roads.

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Considering all the circumstances surrounding this case, the Master is of the opinion that neither of the bases contended for respectively by the intervenors and receivers is correct. It would be manifestly unjust to permit one road to use the property of another by simply paying interest on the original cost years ago, when the property itself, might have increased in value to an enormous extent, and the cost of similar facilities to be purchased or condemned anew for the purpose of the entering road would be increased correspondingly. The change of circumstances, the increased facilities for business, the connections, the increased business itself, are all factors in the problem. It would be manifestly unjust to require a road using the track one-tenth as much at the other to pay one-half of the fixed charges or interest on the value, especially where the contract provides for the use of the road by even other roads than the Wabash and the intervenor. The intervenor must be considered in this matter not simply as a road twenty-one miles long, but a road running throughout the whole length of its projected route, as good faith requires sooner or later it should be built, and with it would come increased business and use of the track.

Endeavoring to extract from the contradictory views and testimony on these points some basis which may be equitable, I think it would be proper to adopt as a basis the present value of the property sought to be used, to allow interest on this sum at the legal rate of interest in the State of Missouri, to-wit:

six per cent., to add to this the actual expenses of repairs
220 and maintenance of the right of way and tracks, and the operating expenses of these tracks and to divide the whole on a wheelage basis, charging each road in proportion to the number of cars and locomotives run over the tracks by each, the Wabash road to keep an accurate account of such maintenance and operating expenses, and each road to keep an accurate account of the number of cars and locomotives run over said tracks by each, and settlement to be made every thirty days between the companies. For the purpose of ascertaining the amount of interest to be paid, I think, from all the testimony, that a fair valuation of the right of way and tracks sought to be and necessary to be used, should be fixed at $1,000,000.00. If the court prefers to fix the operating and maintaining expenses at a given sum, I find from the testimony that $600.00 a mile per annum is a fair estimate of such expenses, which would be $2400.00 a year, for the property sought to be used. In arriving at this conclusion, I considered the fact that it could only apply temporarily, until the court can be fully informed as to the value, and as to the equity of the suggested basis of division on the final hearing. This question is practically a question of fact to be decided from all the circumstances of the case as to what would be fair and equitable.

IV.

Under what regulations should the use be enjoyed, if granted?

It is conceded by the intervenor's counsel, and the entire evidence shows that the management of this property must remain with the receivers or the Wabash Railroad. A
221 chart has been introduced showing the manner in which these tracks might be used between the two roads, based on the present time table of the Wabash road. The testimony of Col. Talmage shows that the property could be operated by both roads, but that he would need additional side-track room for handling the trains of the intervenor. There is also in evidence a time table and rules and regulations at present governing the running of the road by the receivers.

The contract between the St. Louis County Railroad and the St. Louis, Kansas City and Northern Railroad provided that the St. Louis, Kansas City and Northern Railroad should have absolute and sole control of the running, and starting, and regulating of the time tables of and for its own trains, and that no train, locomotive, car or other conveyance of the St. Louis

County Railroad, its successors or assigns shall be allowed or attempted to be started or run within eight minutes of the time fixed or stated for the starting, coming in or running of the train or trains of the St. Louis, Kansas City and Northern Railroad, etc., and there shall be twenty minutes time between the starting and coming in of the trains of the St. Louis, Kansas City & Northern Railroad, and this matter as to specified times shall be under the sole control and regulation of the St. Louis, Kansas City and Northern Railroad.

I therefore recommend that the regulations governing the running of the intervenors' trains, if the right should be granted, should conform to the rules and regulations now in force, and such other reasonable rules and regulations as may [be] hereafter be adopted by the Wabash Railroad, and that the trains of the intervenor should be so arranged as at
222 least eight minutes should intervene between its trains and the trains of the Wabash road at any point of the road, and that the sole control and regulation of the running of the trains of the two roads should remain with the Wabash, St. Louis and Pacific Railroad and its receivers, subject to further orders of court if this should be abused.

V.

Are the intervenors entitled to a mandatory injunction in limine.

The counsel for the Receivers contend that this is such a contract as cannot be specifically enforced against the Wabash road, because the court cannot settle the whole case by its decree, and because there is no mutuality in the contract, and because the court practically would have to make a contract for the parties. To support this proposition they cite Railway Co. vs. Railway Co., 22 Am. and Eng. Railway cases, p. 265. Ripley vs. the Marble Co., 10 Wall. 358. Blanchard vs. Railway Co., 31 Mich. 43. St. Louis Gas Light Co., 70 Mo. 69. I don't think these cases militate against the intervenors right here. The contracts between the parties leave the regulations of running the trains under the control of the St. Louis, Kansas City and Northern Railroad, providing simply that these regulations shall be reasonable, and the only question left is to ascertain a fair and equitable compensation.

The Master is of the opinion that the specific performance of the contract can be decreed and the compensation fixed by the court or its Master if the parties fail to agree.

223 See Watson vs. Sutherland, 5 Wall. 74.
Express Co. vs. R. E. Co., 99 U. S. 109.
Tscheider vs. Biddle, 4 Dillon, 55.
Biddle vs. Ramsey, 52 Mo. 153.
Hogg vs. Vanberkleo, 58 Mo. 202.
Gregory vs. Miguel, 18 Vesey, 328.
Gourlay vs. Duke of Somerset, 19 Vesey, 429.
Arnold vs. Alexander, 44 Mo. 27.
Jackson vs. Jackson, 1st Small & Gifford, 184.
Paris Chocolate Co. vs. Crystal Palace Co., 3rd Small and Gifford, 124.
Wilkes vs. Davis, 3 Merivalle, 509.
Dinham vs. Bradford, 5 Chancery Appeals, 519.

The Counsel for the Receivers also contend that the intervenors are not entitled to a mandatory injunction, first, because they are not in position to avail themselves of it if granted. The evidence shows that the intervenors' railroad connects with the Wabash at Forsyth Junction 3760 feet from the point where the Wabash enters the park, on the north line thereof, and that no right of way from Forsyth Junction to that point has been obtained and no location of road made. The Intervenors' counsel reply to this that the Receivers positively refuse to permit them to use the road under any circumstances, and cite a letter of July 3rd, 1886, written by Col. How to the attorneys for the intervenor in which they say: "the receivers acting under the advice of their counsel are not disposed to admit that the St. Louis, Kansas City & Colorado Railroad has rights under the tripartite agreement of August 11th, 1875, as claimed by you." "During the receiver-
224 ship we will not consent to the running of independent engines or trains over our line through Forest Park and to the Union Depot under the management of any other company." They claim that this refusal, together with the insolvency of the Wabash gives them a right to the order of injunction, without compelling them to go to the additional expense building a road up to the park and then be refused by the Court a passage through it.

Mr. High, in his work on Injunction, says: "it is incumbent upon the parties seeking relief by interlocutory injunction to show some clear, legal and equitable rights and a well-grounded apprehension of the immediate injury to those rights." In section nine he says: "substantial and positive injury must always be made to appear to the satisfaction of the court of equity before it will grant an injunction." Again in Section 22 he says; "an injunction being the strong arm of equity" should never be granted except in a clear case of irreparable injury and with full conviction on the part of the court of its

urgent necessity." Citing 1st Bissell, 515. Citizens Coach Co. vs. Camden R. R., 21 N. J. Eq. 299.

It is conceded that it is not necessary that the wrong should actually have been committed before the Court of Equity will interfere, and that a threat of a commission of a wrong which is within the power of the defendant would be sufficient grounds to justify the interference. High on Injunctions, Sec. 18.

But it is evident that there is no urgent necessity for this remedy, as the intervenor could not avail itself of the order until it had built its track to the Park. It is further evident that no substantial or positive injury would happen to the intervenor by the refusal to permit the use of the track
225 in question until the intervenor was in position to use it.

High on Injunctions, Vol. 1, p. 3.
Goodrich vs. Moore, 2 Minnesota, p. 21.
Bonaparte vs. Camden & Amboy R. R., 1 Baldwin C't C't Rep. 218.

But even conceding that the threatened refusal to permit a passage through the Park, by an insolvent corporation contrary to contract obligations, before the complainant could avail itself of the injunction if granted is ground for an injunction, the Master is of the opinion for another reason that a mandatory injunction cannot be granted in this case. Hilliard on Injunctions, says, Sec. 9, "the object of a preliminary injunction is to prevent some threatening irreparable mischief until an opportunity for a full and deliberate investigation."

See also Fry on Specific Performance of Contracts.
Sec. 769, High on Injunctions, Sec. 4.

Speaking of mandatory injunctions, Eden on Injunctions, p. 51, says: "it must, however, be exercised with caution, and is strictly confined to cases where the remedy at law is inadequate for the purpose of justice and the restoring things to their former condition is the only remedy which will meet the requirements of the case."

Bispham Equity, Sec. 400, says: "a mandatory injunction is one that compels the defendant to restore things to their former condition, and virtually directs him to perform an act. A mandatory injunction is granted only with great caution, and the courts are particularly reluctant to grant such in-
226 junction upon an interlocutory application and before a final hearing."

See also Hull vs. R. R. Co., 12 Am. & Eng. Railway cases, where the subject is carefully gone over by the Supreme Court

of Tennessee. See also reasoning of Judge McKennon in Camblos vs. P. R. R., 4 Brewster, 563, and McCluney vs. Kellogg, 2 Woods, 13.

In opposition to this the intervenors counsel cited many cases in which the United States Courts have granted mandatory injunctions in limine, and particularly the case of the Cole Silver Mining Company vs. Virginia and Water Company, 1st Sawyer, 685, in which Judge Field overruled Judge Sharswood; in Auderied vs. Philadelphia R. R., 68 Penn. 380.

In this case the defendant, by means of a tunnel run into a mountain at a lower altitude than the complainants' tunnel, wrongfully intercepted water appropriated by the complainant flowing in its said tunnel, and a preliminary injunction was granted restraining the continuance of such diversion, even though obedience to the injunction rendered it necessary for defendants to build a bulkhead or dam across the tunnel. See 1st Sawyer, 470. This case came before Judge Field, on a motion to dissolve the injunction, on the authority of the 68th Penn. State, 370. Judge Field declined to do so, and summed up his conclusion in the following words: "Undoubtedly the general purpose of a temporary injunction is to preserve the property in controversy from waste or destruction, or disturbance until the rights and equity of the contesting parties could be fully considered and determined. Usually this could be affected by restraining any interference with it; in some
227 cases the continuance of the injury, the commencement of which has induced the invocation of the authority of a court of equity, would lead to waste and destruction. It is just here when the special jurisdiction of the court is needed to restore the property to that condition in which it existed immediately preceding the commencement of the injury, so that it may be preserved until final decree." Judge Field arrives at this conclusion on the authority of Lane vs. Newdegate, 10 Vesey, 193, where the injunction was mandatory, requiring the restoration of stop gates, etc., as existed previous to the lease; and Robertson vs. Byron, 1st Brown's Chan. 588, where the injunction was mandatory, restraining defendant from so using his flood-gates, etc., as to prevent water flowing to the mill in regular quantities, as it had ordinarily done before; and Ruskin vs. Huskinson, 4 Simon, 13, where the injunction was to prevent the continuance of erecting stables, and from preventing such part of the building already, erected from remaining; and Hepburn vs. Lorden, 2 Henning and Miller, 345, where the defendants were restrained from allowing inflammable, damp jute deposited on premises adjoining plaintiffs, to remain there, and from bringing more to endanger plaintiffs' property.

It will be noticed that in every one of these cases the effect of the mandatory injunction was to restore things to their former condition.

An examination of the cases of Eisenburg vs. East India Co., etc., 10 Jurist, New Series, 1,021, and Mixborough vs. Bower, 7 Beaven, 127, and Wells, Fargo & Co. vs. O. R. & N. Co., 8 Sawyer, 600-618, and Sou. Ex. Co. vs. Memphis R. R. Co., 2 McCrary, 57, and Ex. Co. vs. R. R. Co., 3 McCrary, 147, and
228 Dinsmore vs. L. C. & L. R. R. Co., 2 Fed. Rep., 465, cited by intervenors' counsel, shows that they are all cases where the mandatory injunction restored things to the condition in which they were before the wrong complained of happened.

The Master is, therefore, of the opinion that in a case where a party seeks a specific performance of a contract, or remedy by injunction, in the nature of a bill for the specific performance of a contract, where the right has never been exercised, and when there has been no action on the part of the defendants to change the status quo, that a mandatory injunction in limine cannot be granted.

The only doubt I have as to the correctness of this position in this case, is whether the rule is modified by reason of the Wabash, St. Louis & Pacific Railway Company being in the hands of the Receivers of this Court. The Receivers' counsel seems to make this distinction in his brief, when he says "this is not strictly a case for injunction, but the same ends accomplished by mandatory injunction are had here by an order on the receivers." Citing, High on Receivers, Secs. 374 and 188.

The granting of a mandatory injunction is a matter resting in the sound, judicial discretion of the Chancellor, and in the case of the Central Trust Co. of N. Y. vs. the Wabash, St. L. & P. R. R. Co., St. Louis Transfer R. R., intervenor, reported in 27 Fed. Reporter, p. 73, Judge Brewer says: "it is not gracious in a Federal Court which has taken possession of property by its receivers, to make that possession an obstacle to any proposed public improvement. We should so far as lies within our power, extend every facility to every proposed pub-
229 lic improvement, simply aiming to preserve the rights which attach to the property while it is in our possession, and that is all." In this view his Honor, Judge Treat, concurred.

Under the terms of the reference the Master has endeavored to give the Court full information on every point referred, and his legal conclusions in regard to the points made by the counsel

for the receivers and the intervenors, but he does not understand that it is his province to suggest things which are entirely within the discretion of the Chancellor having in charge the Wabash, St. Louis & Pacific Railway Company.

All of which is respectfully submitted.

GEO. H. SHIELDS,
Special Master pro hac vice.

St. Louis, July 24th, 1886.

230 In the United States Circuit Court, Eastern District of Missouri.

Central Trust Co., of N. Y.
vs.
Wabash, St. L. & P. R'y Co., Consolidated Cause, Intervening Petition St. L., K. C. & Col. R. R. Co., et al.

In respect to this petition I have reached these conclusions:

(1.) As the petitioner has not as yet constructed its road to the boundary line of Forest Park, the point at which if at all the contract right to use the track of the Wabash commences, but has made its connection with the Wabash road at Forsyth Junction some two-thirds of a mile distant, any order at present for the use of the Wabash track would be premature. Perhaps the petitioner may never build to Forest Park. Unless it does it will as admitted never have any semblance of claim upon the Wabash.

(2) It is suggested that although petitioner has not built its road to Forest Park, yet, as it has made a connection with the Wabash two-thirds of a mile west thereof, the court having possession of the Wabash through its receivers, should
231 make an order directing the receivers to permit, temporarily, the use not only of the track, as to which a contract right is claimed, but also the two-thirds of a mile as to which no right is claimed. The suggestion does not commend itself to my judgment. It is not pretended that the Wabash fails in any respect to discharge its full duty as a connecting carrier with the petitioner, or that it makes any charges above the statutory rates. If it can make more money by carrying in its own cars and with its own motive power, than by permitting the trains of another road to run over its track, the duty which is owing to its creditors and stockholders forbids any order, not demandable as a right, but made ex gratia, diminishing its revenues for the pecuniary benefit of another corporation. Counsel urge that the public convenience is against any transfer of passengers at Forsyth Junction. Be it so. The obligation to con-

sult the public convenience rests with the same force on the petitioner as on the Wabash. Let the former, if it would pose as special champion of the public convenience, tender the use of its track to the Wabash, instead of making this demand of the latter. I see nothing at present but a contest between two railroad corporations for respective pecuniary advantages, and in such a contest the question of right determines.

(3.) Counsel for the receivers contend that until petitioners has built its road to the park line, it is in no position to ask any judgment of the court as to its rights over the Wabash track, and, therefore, that all the court can now do is to dismiss the intervening petition. The courts, they say, determine no hypothetical questions, but only pass upon existing claims.

Counsel are, I think, mistaken. Petitioner is proceed-
232 ing in apparent good faith to build a road from St. Louis westward. It has twenty miles completed and more in process of construction. It seeks an entrance to the St. Louis Union Depot. It proposes to build from Forsyth Junction two-thirds of a mile to the park line, and then run over the Wabash track to the Union Depot. It claims the latter as a contract right. If such right does not exist it will have to seek entrance in another way, and the building of the two-thirds of a mile of track to the Park line may be a useless expense. I think common justice requires that its rights of entrance over this route be determined before it is compelled to expend a large sum of money in perhaps a useless work. This is a quasi condemnation proceeding. And in this aspect its right of condemnation along the entire route may legitimately be determined before any expenditures in the way of actual construction.

(4.) This intervening petition is in the nature of an application for a mandatory injunction. Such an injunction seldom goes in limine, and never unless to preserve the statu quo, or where the right is clear, and the only controversy one of compensation, protection as to which can be fully secured by bond. Here the petitioner has never had the use of the Wabash track. It seeks by this proceeding not to maintain but to change the statu quo. Its rights have never been determined. They are disputed. They are doubtful. If there were no receivership, no order for enforcing this contract would be made until after bill, answer and decree. This intervening petition takes the place of an ordinary bill, but there should be answer and full hearing upon the question of right before any order enforcing the contract is made. Neither party should gain or lose
233 by the mere fact of a receivership. So far as possible the regular and orderly administration of justice should be preserved. No answer has been filed by the Receivers of the

Wabash. While, of course, the defenses of the Wabash have been suggested, yet an answer should be filed and a full hearing be had upon the question of right. I have given some examination to the question of right and will only say, that I think it very doubtful. More than that it would perhaps be improper for me to say in advance. Whether any obligation rests upon the Wabash, whether that obligation, if one exists, extends beyond the one-half of the right of way of the St. Louis County R. R., not conveyed in the first instance to the St. L., K. C. and Northern R. R. Co., whether it is an obligation as to use of track, or merely that portion of the right of way not occupied by Wabash tracks, are questions which certainly deserve careful consideration, and should not be hastily determined in limine or upon any preliminary inquiry.

I endorse fully that which is so well and ably said by the Master as to the impropriety of mandatory injunctions in limine, and I can but express my admiration of and thanks for his clear and discriminating report, prepared as it was in the brief time I allowed him.

The order, therefore, will be that the matter be referred to the same Master; that the Wabash Co., the receivers, and the Central Trust Co., be ruled to answer within fifteen days; that either party be allowed to offer additional testimony, and that the Master report on or before the 8th of September. Exceptions by either party can then be filed within five days, and the final hearing had the first of the coming term.

D. J. BREWER,
Circuit Judge.

234 In the Circuit Court of the United States, for the Eastern District of Missouri.

The Central Trust Company of New York et al., Complainants,
Nos. 2357 and 2464. vs. In Equity.
The Wabash, St. Louis & Pacific Railway Company et al., Defendants.

Consolidated Cause.

Order in re Intervening Petition of St. Louis, Kansas City and Colorado Railroad Company et al.

July 30th, 1886.

The report of the Special Master having been filed herein, and the matters and things therein contained having been fully considered, it is ordered, adjudged and decreed as follows, to-wit:

That said matter be re-referred to George H. Shields, Special Master for further report; that the Wabash, St. Louis and Pa-

cific Railway Company, Thomas E. Tutt and Solon Humphreys, Receivers, and the Central Trust Company of New York
235 and James Cheney, trustees, file answers to complainants' petition within fifteen days; that either party be allowed to offer additional testimony before the Master, and that said Master file his further and supplemental report herein on or before September 8th, 1886.

It is further ordered that exceptions to the Master's supplemental report may be filed by either party herein within five days after the incoming of said report, and final hearing had the first of the coming September term.

236 United States of America, Eastern District of Missouri.

In the Circuit Court of the United States, for Eastern District of Missouri.

Central Trust Company of New York et al., Complainants,
vs.
Wabash, St. Louis & Pacific Railway Company, et al., Defendants.

Consolidated Cause in Equity.

To the Honorable, the Judges of said Court:

Your orators, the city of St. Louis, a municipal corporation duly authorized, organized and acting under the laws of the State of Missouri, and a citizen of said State of Missouri, and the St. Louis, Kansas City & Colorado Railroad Company, a corporation duly authorized, organized and acting under the laws of the State of Kansas and a citizen of said State of Kansas intervening herein, and by leave of court, file this their amended bill herein, and complain of the Wabash, St. Louis & Pacific Railway Company, a corporation duly authorized, organized and acting under the laws of the State of Missouri, and a citizen of said State of Missouri, in said Eastern District, say:

237 First. That on the.....day of....., 1884, by the order of this court, Solon Humphreys and Thomas E. Tutt, were duly appointed receivers of the said Wabash, St. Louis & Pacific Railway Company, and that they are now such receivers and in charge of the property, affairs and business of said company, as officers of this court, subject to its direction; that said Wabash, St. Louis & Pacific Railway Company owns a right of way with a standard gauge track thereon in the city of St. Louis, commencing at Eighteenth street in said city, near Poplar street, at the Union Depot in said city, running west to the east line of Forest Park in said city; thence through said park to Union avenue in said city; thence

in a northeasterly direction to the town of Ferguson in the county of St. Louis; thence in a northerly direction to the city of Moberly in the county of Randolph, State of Missouri; thence west to Kansas City, and thence north to Ottumwa, Iowa. That prior to the 11th day of August, 1875, the St. Louis, Kansas City & Northern Railway Company was a corporation of the State of Missouri, and then owned a line of railway in the city and county of St. Louis, running to a point opposite the city of St. Charles in St. Charles County, State of Missouri, passing through the town of Ferguson in St. Louis County; thence in a direct line to the city of St. Louis, at or near Biddle street on the levee of said city; that on said 11th day of August, 1875, said St. Louis, Kansas City & Northern Railway Company, being desirous of obtaining an entrance to the said Union Depot in said city of St. Louis, which depot was then and is now located at or near Eighteenth street and Poplar street in said city, for the purpose of reaching said Union Depot at said point, determined to
238 build a branch railway from said town of Ferguson in said St. Louis County, extending in a southeasterly direction from said town of Ferguson to Union avenue in the city of St. Louis; thence through said Forest Park; thence to said Eighteenth street in the city of St. Louis at said Union Depot.

2. Complainants further state that at said date, that is to say, August 11th, 1875, the body of land consisting of about 1,300 acres, known as "Forest Park," and which was then situated in the county of St. Louis, and near the western limits of said city of St. Louis, was under the control and management of a Board of Commissioners, of which Andrew McKinley was president and Charles Bland Smith was secretary; that said Board of Commissioners were duly appointed and acting under an act of the Legislature of the State of Missouri, approved March 25th, 1874, being an act entitled "an act to establish Forest Pask in the county of St. Louis, to provide for the establishment and government thereof, and to provide for the issue of bonds by the County Court of St. Louis County for the purposes of said park, and for the purchase and condemnation of lands for the same."

That under and by virtue of the said act, the said Board of Commissioners did duly establish said Forest Park for the people of the county of St. Louis. That the said Board under the said act had power to lay off, improve, adorn, and generally govern, manage and control the use of said park, and the avenues surrounding the same, together with other powers given and granted under and by said act.

3. That prior to the 11th day of August, 1875, the St. Louis County Railway Company, a corporation duly author-
239 ized, organized and acting under the laws of the State of Missouri, had duly located its line of railroad, and had acquired a right of way forty feet wide for its road through said park, commencing at a point on the north side of said park, where Union avenue intersects said park; thence in a southeasterly direction through said park to the eastern line of the same; and from said eastern line to said Eighteenth street said St. Louis County Railroad Company was the owner of a large part of such right of way. That the said St. Louis, Kansas City and Northern Railway Company found it necessary in order to complete and operate its said branch railway from said town of Ferguson to said Union Depot, to obtain a right of way from said Board of Commissioners through said park; that thereupon on the 11th day of August, 1875, the said St. Louis, Kansas City and Northern Railway Company, and the said St. Louis County Railroad Company entered into an agreement for the joint use of the right of way of said St. Louis County Railway through said park, and for the purchase of a strip 30 feet wide off the south part of its right of way up to the terminus of its road in the city of St. Louis at Eighteenth street.

That by the terms of said agreement, the said St. Louis County Railroad Company, and the said St. Louis, Kansas City and Northern Railway Company were to own the right of way and the railway thereon from said point on north line of said park to a point on east line at east end of tunnel, and cut next east of said east line of said park, and enjoy the joint use thereof for the purposes of their respective roads. The said St. Louis, Kansas City and Northern Railway Com-
240 pany was to advance all sums necessary to complete the construction of the railway between the said points, and the said St. Louis County Railroad Company was to pay to said St. Louis, Kansas City and Northern Railway Company, one-half of any sum so advanced by it for the purpose last aforesaid. That by the said contract, if the said St. Louis County Railroad Company failed to pay said one-half of said sum, being the sum of sixty-five thousand dollars, to said St. Louis, Kansas City and Northern Railway Company, it could not enjoy the use of said railway between the said points. That the said St. Louis County Railroad Company did fail to pay the said one-half as provided in and by said contract, and thereupon the said St. Louis, Kansas City and Northern Railway Company, under the said agreements and conveyances of even date with said agreements, held said right of way under and subject to the terms thereof, a duly certified copy of which agreement is herewith filed, marked Exhibit "A."

That after the execution of said agreement, to-wit: On the 11th day of August, 1875, the Board of Forest Park Commissioners, and the said St. Louis County Railroad Company, and said St. Louis, Kansas City and Northern Railway Company, duly entered into a certain tripartite agreement of that date, duly recorded in the Recorder's Office of City of St. Louis, September 5th, 1879, in book 620, page 8, whereby the said Board of Forest Park Commissioners granted and conveyed unto and licensed and permitted the said St. Louis, Kansas City and Northern Railway Company, its successors and assigns, to have, hold, use and enjoy a said right of way forty-two feet wide, in, upon, and through said park in common with and to be held and enjoyed jointly with said St. Louis County Railroad Company and its assigns on the terms of the
241 said contract between them, and which right of way was that right of way then and there established by said tripartite agreement as the sole and final right of way for said companies, through said park, and under the terms and conditions that said St. Louis, Kansas City and Northern Railway Company, its successors and assigns, should permit other railroads to use its right of way in and through said park and up to the terminus of its road in the city of St. Louis, upon such terms and for such fair and equitable compensation to be paid to it therefor as might be agreed upon by said companies, a certified copy of said agreement is herewith filed, "Exhibit B."

Said St. Louis, Kansas City and Northern Railway Company, in the year 1875, subsequent to the execution of said agreement, did construct said railroad from said Eighteenth street to said Union avenue, and soon thereafter built its said road from said town of Ferguson, and entered upon and operated the same from said town of Ferguson through said park to said Eighteenth street, the point where the said Union depot is located. That on the 24th day of December, 1878, the said St. Louis, Kansas City and Northern Railway Company purchased and became the owner by deed of all the remaining rights, franchises, property and right of way formerly held or owned by said St. Louis County Railway Company through said park and to said Eighteenth street, subject to the said agreements, and on the ..... day of ....., 1879, conveyed the same to said Wabash, St. Louis and Pacific Railway Company by articles of consolidation, duly entered into as authorized by law, and since said date, the said latter company has used, enjoyed, owned and operated all the prop-
242 erty formerly owned by said St. Louis, Kansas City and Northern Railway Company, including the said railroad and right of way from said Union avenue to Eighteenth street and now in the exclusive possession and enjoyment there-

of. That on the ..... day of ..... 1876, the limits of the said city of St. Louis, were lawfully extended westwardly so as to include the whole of said Forest Park; and said city duly became and is now the owner of the said park, with full power to control and manage the same. The said Board of Forest Park Commissioners was in the year 1876, by law abolished, and the said city then became, has ever since been and is now, the successor of said Board of Forest Park Commissioners, and the owners of said park, and invested with all the rights reserved by the said board under the contract or otherwise heretofore made for on behalf of said park by the said Board. That the said city of St. Louis, one of the orators herein, is by law charged with the duty of protecting the said park, and interested in preventing the said park from being cut up by lines of railway seeking entrance to said city, and in limiting other railroads including said St. Louis, Kansas City & Colorado Railroad Company, and to the use of said right of way through said park and to said Union Depot, and enforcing the said tripartite agreement for the benefit of said St. Louis, Kansas City and Colorado Railroad Company, and other railroads that may seek entrance through said park to said Union Depot. That the said city is a large municipal corporation, having a population of about 500,000 inhabitants, is an important commercial center to which different lines of railway from year to year are seeking entrance to its
243 Union Depot, the said Union Depot is a point to which all railways entering said city converge. That to avoid the cutting up of said park, and thereby destroy its beauty and attrractiveness, as well as to afford facilities for other railways to enter the said Union Depot, said Board of Commissioners in and by the said tripartite agreement of August 11th, 1875, imposed the condition, that the said St. Louis, Kansas City & Northern Railway Company its successors and assigns, should permit other railroads under such reasonable regulations and terms as might be agreed upon, to use its said right of way through the said park and up to the terminus of its road in the city of St. Louis, upon such terms and for such fair and equitable compensation to be paid as might be agreed upon by said companies.

That the said Wabash, St. Louis & Pacific Railway Company now holds and enjoys all of said right of way under the terms and conditions of the said agreements and deeds and not otherwise.

Your orators further say, that the St. Louis, Kansas City & Colorado Railroad Company has completed its railway, being of standard gauge, from the City of St. Louis to Creve Coeur Lake, a distance of about twenty miles, and that the same is

now ready for operation. That it is engaged in further constructing its road in the State of Kansas, as well as in the State of Missouri, with a view of operating the same from said State of Kansas into and through the State of Missouri to said City of St. Louis; that its railway, which has been built from said Creve Coeur Lake to the City of St. Louis, now forms a junction with the railway of said Wabash, St. Louis &
244 Pacific Railway Company at Forsyth Junction, a point at or near the north line of said Park at said Union avenue; and desires to avail itself of the provisions of said tripartite agreement by using the right of way of said Wabash, St. Louis & Pacific Railway Company through said park and to the terminus of its road in said City of St. Louis at Eighteenth street at said Union Depot. That said St. Louis, Kansas City & Colorado Railroad Company was duly incorporated as aforesaid on the .... day of ....., 1884; and has constructed its railway as aforesaid since said date.

Your orators allege that by and under the terms of said tripartite agreement and the said deeds to said St. Louis, Kansas City & Northern Railway Company, the said St. Louis, Kansas City & Colorado Railroad Company is now entitled to the use of said right of way of said Wabash, St. Louis & Pacific Railway Company, through said park and up to the terminus of its road in the city of St. Louis, at said Eighteenth street, the said right of way being about four miles in length, by paying to it the fair and equitable compensation for such use; that the said St. Louis, Kansas City & Colorado Railroad Company has applied to said receivers, Solon Humphreys and Thomas E. Tutt, for the use of said right of way on the terms of said tripartite agreement, and endeavored to agree with them upon the amount of money to be paid to them as a fair and just compensation for the use of said right of way; but said Wabash, St. Louis & Pacific Railway Company, through said receivers, refused absolutely and unqualifiedly to permit said St. Louis, Kansas City & Colorado Railroad Company to run its trains over said right of way upon any terms, and deny that said com-
245 pany has the right to use said right of way, as claimed; the said St. Louis, Kansas City & Colorado Railroad Company have offered to pay them such fair and equitable compensation as may be just, and now offers to pay such fair and equitable compensation as this Honorable Court, by its order and decree, may require.

Your orators further state that by reason of the refusal of the said Wabash, St. Louis & Pacific Railway Company, through the said receivers, to permit the use of said right of way as aforesaid, the interests of the city of St. Louis are suffering, and the said St. Louis, Kansas City & Colorado Rail-

road Company is prevented from operating its railway, and has thereby suffered and is now suffering irreparable damage and loss by reason of the refusal aforesaid.

Wherefore, your orators pray that a writ of injunction issue out of and under the seal of this Honorable Court, enjoining and restraining the said Wabash, St. Louis & Pacific Railway Company, and the said Solon Humphreys and Thomas E. Tutt, as such receivers, and each of them, and of their agents, servants, counsellors and employes, from in any manner refusing to permit your orator, the St. Louis, Kansas City & Colorado Railroad Company, under such reasonable regulations and terms as to this Court may seem proper, from using the said right of way of said Wabash, St. Louis & Pacific Railway Company, commencing at the north line of said park, where the railway of said Wabash, St. Louis & Pacific Railway Company enters said park, thence over said right of way to said Eighteenth street in said city of St. Louis, by running its engines and cars over and upon said right of way, including the
246 tracks of said Wabash, St. Louis & Pacific Railway Company between the points at said Union avenue and said Eighteenth street, that a temporary injunction, pending the said hearing thereof, against the said defendants, as herein prayed, be granted; that the said receivers, Solon Humphreys and Thomas E. Tutt, be ordered to permit said St. Louis, Kansas City & Colorado Railroad Company to use said right of way and tracks between said points last above named, and on the terms aforesaid; and that your orators may have such further relief in the premises as is consistent with equity and good conscience, and as to this Honorable Court may seem meet.

May it please your Honor to grant unto your orator a writ of subpoena directed to the defendants and thereby commanding them and each of them to be and appear before this Honorable Court at some certain day to be fixed therein, and answer the premises and abide by and perform such order and decree as may be passed therein, and as to your Honor shall seem meet. And your orators as in duty bound will ever pray.

LEVERITT BELL,
Solicitor for City of St. Louis.
NOBLE & ORRICK,
Sols. for St. Louis, Kansas City & Colorado Railroad Company.
DYER, LEE & ELLIS,
Of Counsel.

247 United States of America,
Eastern District of Missouri—ss.

John C. Orrick, one of the solicitors for the intervenors herein duly sworn, says that the matters alleged and set forth in the above bill so far as they are stated upon knowledge, are true, and so far as they are stated upon information and belief he believes them to be true.

JOHN C. ORRICK.

State of Missouri,
City of St. Louis—ss.

Sworn to and subscribed before me this 31st day of July, A. D. 1886.

Witness my hand and official seal.

C. D. GREENE, JR.,
Notary Public.

Leavenworth, Aug. 3d, 1886.

Let this amended intervening petition be filed with like turn to answer as given in prior order.

D. J. BREWER,
Circuit Judge.

248 United States of America,
Eastern District of Missouri—ss.

In the Circuit Court of the United States for the Eastern District of Missouri.

Central Trust Company of New York et al., Complainants,
vs. In Equity.
Wabash, St. Louis & Pacific Railway Company et al., Defendants

Consolidated Cause.

Answer to the Amended Intervening Petition of the City of St. Louis and the St. Louis, Kansas City and Colorado Railroad Company.

The Wabash, St. Louis & Pacific Railway Company, Thomas E. Tutt and Solon Humphreys, receivers, and the Central Trust Company of New York, and James Cheney, trustees, as hereinafter stated, now and at all times saving and reserving unto themselves all and all manner of benefit of exception that may be had or taken on account of the imperfections and errors in said amended bill of intervention contained, for
249 answer thereto respectfully say:

It is true that said Thomas E. Tutt and Solon Humphreys are the receivers in charge of the property, affairs and business of the Wabash, St. Louis & Pacific Railway Company, and that as such they are subject to the orders and directions of this court.

That it is true, as averred in said bill, that said Wabash, St. Louis & Pacific Railway Company owns a right of way with a standard gauge track thereon in the city of St. Louis, commencing at Eighteenth street in said city, and running west to the east line of Forest Park in said city; thence through said park to Union avenue, and from thence in a northwesterly direction to Ferguson, in the county of St. Louis; Moberly and Kansas City, in the State of Missouri, and Ottumwa, in the State of Iowa.

That it is true that prior to the 11th day of August, 1875, the St. Louis, Kansas City & Northern Railway Company was a railroad corporation of the State of Missouri, and that it then owned a line of railway extending from a point opposite the city of St. Charles, through the said town of Ferguson to a point at or near Biddle street on the levee, in the city of St. Louis; and that on said 11th day of August, 1875, said St. Louis, Kansas City & Northern Railway Company was desirous of obtaining an entrance to the Union Depot in said city, and that for the purpose of reaching said depot it determined to build a branch railway from the said town of Ferguson, in a southeasterly direction, to Union avenue in said city, and from thence through said Forest Park to Eighteenth street.

250 They admit that on or about said 11th day of August, 1875, there was a body of land consisting of about thirteen hundred acres, known as "Forest Park," all of which was then situated in the county of St. Louis, near the western limits of said city, and which was, for certain purposes, under the control and management of a Board of Commissioners, of which Andrew McKinley was president and Charles Bland Smith was secretary; and defendants believe said board was duly appointed under an act of the Legislature of the State of Missouri, approved March 25, 1874, being an act entitled "An act to establish Forest Park in the county of St. Louis; to provide for the establishment and government thereof, and to provide for the issue of bonds by the County Court of St. Louis County for the purposes of said park, and for the purchase and condemnation of lands for the same.

They believe it is true that said park had, on the date last aforesaid, been duly established, and that said Board had, under said act, the power to lay off, improve, adorn and generally

govern, manage and control the use of said park and the avenues surrounding the same.

Defendants admit that prior to the 11th day of August, 1875, the St. Louis County Railroad Company was a corporation duly organized under the laws of the State of Missouri, and had duly located its line of railroad, and acquired a right of way forty feet wide, for its road through said park commencing at a point on the north side thereof, where Union avenue intersects said park, and extending from thence in a southeasterly direction, through said park, to the eastern line of the same.

Defendants say it is not true, and they deny, that said St. Louis County Railroad Company was, on said 11th day
251 of August, 1875, the owner of the larger part of right of way for its railroad, extending from the eastern line of said Forest Park, in a southeasterly direction to Eighteenth street in the city of St. Louis, or to the Union Depot in said city; but defendants admit that said County Railroad Company was, on the date last aforesaid, the owner of a right of way through a number of lots and tracts of land situated between said park and said Union Depot.

Defendants admit that on the 11th day of August, 1875, the said St. Louis, Kansas City and Northern Railway Company and the said St. Louis County Railroad Company entered into an agreement for the joint use of the right of way of said St. Louis County Railroad Company through said park, and for a sale by said St. Louis County Railroad Company to said St. Louis, Kansas City and Northern Railway Company of a strip twenty-eight or thirty feet in width off the south part of all the lots and tracts of land then owned by it between said park and said Eighteenth street.

Defendants admit that by the terms of said agreement, the St. Louis County Railroad Company and the St. Louis, Kansas City and Northern Railway Company were to have the joint use of said right of way through said park, and up to the end of the tunnel and cut next east of the east line of said park, on the terms and conditions, and for a period of time therein set forth, and that by the terms of said contract said St. Louis, Kansas City and Northern Railway Company was to advance all sums of money necessary to complete the construction of the railway between said points, and that the St. Louis County Railroad Company was to repay to said St. Louis, Kan-
252 sas City and Northern Railway Company one-half of all sums so advanced for the purposes last aforesaid.

Defendants admit that it was provided in said contract, that if said St. Louis County Railroad Company failed to pay to

said St. Louis, Kansas City and Northern Railway Company one-half the sum so advanced, the St. Louis County Railroad Company should not enjoy the use of said railway between said points.

Defendants admit that said St. Louis County Railroad Company failed to pay one-half of said sum, as provided in said agreement, and that said St. Louis, Kansas City and Northern Railway Company has ever since held said right of way through said park, tunnel and cut for its sole and exclusive use, free of all claims, rights or interests of said St. Louis County Railroad Company.

Defendants admit that a true copy of said agreement is filed with the petition herein, marked "Exhibit A."

Defendants admit that after the execution of said agreement between said St. Louis County Railroad Company and said St. Louis, Kansas City and Northern Railway Company, to-wit: on the 11th day of August, 1875, the Board of Forest Park Commissioners, the St. Louis County Railroad Company and said St. Louis, Kansas City and Northern Railway company, entered into a certain tripartite agreement, whereby said Board of Commissioners assumed and pretended to grant, convey, license and permit the said St. Louis, Kansas City and Northern Railway Company, its successors and assigns, to have, hold, use and enjoy the said right of way 40 feet wide, heretofore owned by said St. Louis County Railroad Company, and two feet in addition, in, upon and through said park,
253 in common with, and to be held and enjoyed jointly with said St. Louis County Railroad Company and its assigns, upon the terms set forth in the aforesaid contract between said railroad companies.

Defendants admit that a true copy of said tripartite contract is filed with the petition herein, marked Exhibit "B."

Defendants say it is not true, and they deny that said pretended grant was made upon condition that said St. Louis, Kansas City and Northern Railway Company, its successors or assigns, would permit other railroads to use its right of way in or through said park, and up to the terminus of its road in said city of St. Louis, upon such terms, or for such fair and equitable compensation to be paid therefor as might be agreed upon by said companies, or on any terms whatever.

Defendants admit that said St. Louis, Kansas City and Northern Railway Company, in or about the year 1875, constructed its said railroad from said Eighteenth street to said Union avenue, and to said town of Ferguson, and that it en-

tered upon and operated the same from said Ferguson through said park to said Eighteenth street and the Union depot aforesaid.

Defendants deny that on the 24th day of December, 1878, or at any other time, the said St. Louis, Kansas City and Northern Railway Company purchased or became the owner by deeds or otherwise, of all the remaining rights, franchises, property and rights of way formerly held or owned by said St. Louis County Railroad Company, through said park, and to said Eighteenth street, subject to the agreements aforesaid, or subject to any contract or agreements whatsoever with said Park Commissioners or said St. Louis County Rail-
254 road Company; but they admit that on or about the.... day of....., 1879, said St. Louis, Kansas City and Northern Railway Company was consolidated with the Wabash Railway Company, under the name of the Wabash, St. Louis and Pacific Railway Company, and that since said date the company last aforesaid, and the defendants herein, have used, enjoyed and operated all the property formerly owned by said St. Louis, Kansas City and Northern Railway Company, including said railroad and right of way from said Union avenue to Eighteenth street, and that they are now in the exclusive possession and enjoyment thereof.

That as to whether on or about the.....day of....., 1876, the limits of the city of St. Louis were lawfully or otherwise extended westwardly, so as to include the whole or any part of said Forest Park; or as to whether said city is now the owner of said park, with power to control or manage the same, or as to whether said Board of Park Commissioners was, in the year 1876, or at any other time, abolished; or as to whether said city has become the successor of said Board of Park Commissioners, or the owners of said park, or invested with all or any of the rights reserved by said board under said contract with the aforesaid parties; or as to whether said city is by law charged with the duty of protecting said park, or interested in preventing the same from being cut up by lines of railway seeking entrance to said city, or in limiting other railroads, including said St. Louis, Kansas City and Colorado Railroad Company to the use of any particular right of way through said park, or to said Union Depot, or in enforcing any of the provisions of the agreements afore-
255 said, defendants have no knowledge or information save as they are informed by said petition.

Defendants admit that the said city of St. Louis is a large municipal corporation, and that said Union Depot is a point to which all railways entering said city converge; but defend-

ants say it is not true and they deny that to avoid the cutting up of said park, or destroying its beauty or attractiveness, or that in order to afford facilities to other railways to enter said Union Depot, the said Board of Commissioners, in or by said tripartite agreement, imposed or attempted to impose as a condition that said St. Louis, Kansas City & Northern Railway Company, or its successors or assigns, should permit other railroads to use its said right of way through the park, and up to the terminus of its said road in the city of St. Louis, upon such regulations or terms, or for such fair or equitable compensation as might be agreed upon by said companies.

Defendants deny that they, or said Wabash, St. Louis & Pacific Railway Company, now hold or enjoy all or any portion of said right of way between said Union avenue and said Union Depot under any agreement with any person or party whomsoever requiring them to permit other railroads or railroad companies to use the same; but defendants aver that they now hold and enjoy the right of way through said Forest Park, by and through grants from one W. D. Griswold and the State of Missouri to said St. Louis County Railroad, free and unincumbered with any condition, easement or license from any source whatever, and they deny that, except as hereinafter stated, they hold said right of way or any part thereof under the agreements and deeds aforesaid.

256 That as to whether the said St. Louis, Kansas City & Colorado Railroad Company has completed its line of railroad from the city of St. Louis to Creve Coeur Lake, a distance of twenty miles, or as to whether the same is now ready for operation, or as to whether said company is engaged in constructing its road in the state of Kansas, or in the state of Missouri, with a view of operating the same from said State of Kansas into or through the State of Missouri to said city of St. Louis, defendants have no knowledge or information save as they are informed by said petition.

Defendants admit that the railway of said St. Louis, Kansas City & Colorado Railroad Company forms a junction with the railway of said Wabash, St. Louis & Pacific Railway Company at a point known as "Forsyth Junction," in the city of St. Louis, but as to whether said St. Louis, Kansas City & Colorado Railroad Company was duly incorporated, in 1884, or as to whether the same has ever been duly incorporated, defendants are not informed.

Defendants say it is not true, and they deny that by the terms of said tripartite agreement, or of any deed to said St. Louis, Kansas City & Northern Railway Company, the said St. Louis,

Kansas City & Colorado Railroad Company is now entitled to the use of said right of way of said Wabash, St. Louis & Pacific Railway Company through said park, or up to the terminus of its said road in the city of St. Louis, at said Eighteenth street; but they admit that they have refused, and that they still refuse to permit said St. Louis, Kansas City & Colorado Railroad Company to run its trains over its right of way, and that they have denied and now deny that said company has the
257 right to run its trains over said right of way.

Defendants deny that by reason of their refusal to permit the said St. Louis, Kansas City and Colorado Railroad Company to run its trains over said right of way, the interests of said city of St. Louis have suffered, or are suffering; or that said St. Louis, Kansas City and Colorado Railroad Company is prevented from operating its railway, or that it has suffered, or is now suffering irreparable damage or loss, or any damage or loss by reason of any act of these defendants; but, on the contrary thereof, defendants state that the railroad of said St. Louis, Kansas City and Colorado Company commences at said Forsythe Junction, in said city of St. Louis, and extends, as defendants are informed, a distance of some ten of fifteen miles in the direction of Creve Coeur Lake, in the County of St. Louis, and these defendants say that they have been at all times ready and willing, and that they are now ready and willing to receive and deliver passengers and freight to said St. Louis, Kansas City and Colorado Railroad Company at said Forsyth Junction, and transport the same to any and all points of destination upon the lines of said Wabash, St. Louis and Pacific Railway Company, upon fair and equitable terms, and for a compensation within the limits fixed by law for such service.

Further answering said petition, defendants state the truth to be, that prior to the passage of any law for the establishment of said Forest Park, to wit: on or about the 1st day of November, 1871, the said St. Louis County railroad Company was a corporation, duly organized under the laws of the State of Missouri, for the purpose of constructing and operating
258 a railroad from the city of St. Louis, in a westerly direction, to some point on Creve Coeur Lake, in the County of St. Louis, and that W. D. Griswold was, on the date aforesaid, the owner of a tract of land in the County of St. Louis, embracing all that portion of Forest Park upon and through which the defendants' railroad was afterwards constructed, and upon and through which the same is now maintained and operated.

That being the owner of said land, said Griswold afterwards, on or about the 3rd day of November, 1871, granted to said St. Louis County Railroad Company, its successors and assigns, a right of way, forty feet in width, through said tract for the location, construction and maintenance of its railroad.

That in the deed of said Griswold, conveying said right of way to said St. Louis County Railroad Company, it was, and is, provided, that if in the building said railroad it should be found that the forty feet aforesaid would not be sufficient for the completion thereof in a satisfactory manner, then the toe of the embankment might run over on to the adjoining lands, and that said company might also extend the slope of the cuts as far beyond the limits of said forty feet as might be necessary or convenient.

Defendants state that afterwards, to wit: on or about the 25th day of March, 1874, an act of the General Assembly of the State of Missouri was duly passed and approved, entitled "An Act to establish Forest Park in the County of St. Louis; to provide for the establishment and the government thereof, and to provide for the issue of bonds by the County Court of St. Louis
County for the purposes of said park, and for the pur-
259 chase and condemnation of lands for the same."

That in and by the third section of said act, it was and is provided: "That nothing in said act contained should prevent the St. Louis County Railroad Company from using and occupying a right of way, of the width of not more than seventy feet, through the northeastern portion of said Forest Park; that said railroad should only enter the park through Duncan's Subdivision, on the east side of said park, and run westwardly on the northern side of the River Des Peres, and pass out of said park at a point on the northern line thereof, east of Union avenue; that no switch or siding should be constructed by said railroad company in said park, nor more than one depot established therein, which should be for passengers only; and provided further, that the grade of said railroad, so far as the same run through said Forest Park, should be approved by the Park Commissioners."

That afterwards, on or about the 11th day of August, 1875, the line of railroad of said St. Louis, Kansas City and Northern Railway Company being continuous and connected with the line of railroad of said St. Louis County Railroad Company, from a point west of said park, in the County of St. Louis to Tayon avenue, in the City of St. Louis, said companies entered into the contract filed with the petition herein, marked Exhibit "A".

That in and by said contract it was, and is, provided:

1st. That said County Railroad Company would, for the sum of $125,000, convey to said St. Louis, Kansas City and Northern Railway Company, by a deed of general war-
260 ranty, a strip or lot twenty-eight feet in width through all tracts and lots then owned by it between the junction of their said railroads and the north line of said park.

2d. That it would convey, by like deed, a lot twenty-eight feet in width through each tract of land then owned by it between the eastern line of the park and the then western limits of the city.

3d. That it would convey, by like deed, a lot thirty feet in width through each tract then owned by it between the then western limits of the city and said Tayon avenue.

4th. That it would convey, by like deed, an undivided one-half interest in and to its said right of way, and in and to all other rights, privileges, franchises, powers and immunities, owned by, or vested in, or enjoyed by, or that might thereafter be acquired and owned by, vested in, or enjoyed by it, in, through, or upon Forest Park, by any means or from any source whatever.

5th. It was agreed that the use and enjoyment of the rights, privileges and franchises, powers, immunities, improvements and property, in, through and upon a proposed tunnel and cut adjoining the eastern line of Forest Park, and under Barnes avenue, and to the east end of said cut, should be in common by the parties thereto, their successors and assigns.

6th. It was agreed that at Compton avenue, in the City of St. Louis, and also for a limited distance west of Tayon avenue, the County Railroad Company should, under certain circumstances, have a right to lay one of the rails of its
261 railroad track on the thirty foot strip to be conveyed by it to the St. Louis, Kansas City and Northern Railway Company.

7th. It was agreed that the St. Louis, Kansas City & Northern Railway Company should advance all funds necessary to construct and maintain the railroad bed and road in, upon and through said Forest Park, and said tunnel and cut for the joint use of both said parties, their successors and assigns, and that said County Railroad Company should, within two years from the date of said contract, pay to said St. Louis, Kansas City & Northern Railway Company one-half the cost thereof; but in case said County Railroad Company should fail to make such payment, then all the rights, privileges, franchises, powers, immunities, improvements and property of said County

Railroad Company, in, through or upon said Forest Park, and in, through, over and upon said tunnel and cut, should by virtue and force of such failure and refusal, without further process or proceedings, become forfeited and belong to said St. Louis, Kansas City and Northern Railway Company, its sucessors and assigns, and said last named Company was in case of such failure, authorized to enter upon the sole and absolute possession and enjoyment of all said rights, privileges, franchises, powers, immunities, improvements and property, to the exclusion of said County Railroad Company, its successors and assigns.

8th. It was further agreed, that in case said County Railroad Company should fail to make, or elect not to make such payments within the time aforesaid, then said company would execute and deliver to said St. Louis, Kansas City and Northern Railway Company a good and sufficient deed, granting and conveying to it, its successors and assigns, all the right,
262 title and interest in law or equity, which said County Railroad Company had, or might have in and to said railroad and property in said park, tunnel and cut, clear of all incumbrances.

Defendants further state that after the execution of the contract last aforesaid, the said St. Louis, Kansas City and Northern Railway Company entered into a certain other agreement with said County Railroad Company and the Commissioners of said Forest Park, a copy whereof is filed with the petition herein, marked "Exhibit B," but defendants deny that said agreement was duly recorded.

That by said agreement, the width of the right of way of said County Railroad Company through said park was fixed at forty-two feet; but defendants say that said County Railroad Company was already the owner of a right of way forty feet in width through said park under its aforesaid deed from Griswold, and that by the third section of said act of March 25th, 1874, establishing said park, said commissioners had no power to prevent said St. Louis County Railroad Company from occupying or making any other lawful use or disposition of its said right of way, previously acquired as aforesaid. And defendants say that neither the St. Louis County Railroad Company nor the St. Louis, Kansas City and Northern Railway Company, nor the Wabash, St. Louis and Pacific Railway Company, nor said Humphreys and Tutt, as receivers, nor either of the other defendants herein, have ever, in any manner, occupied or used a right of way in or through said park, of greater width than is mentioned and conveyed in said deed from Griswold to said St. Louis County Railroad Company.

263 That prior to the making of said tripartite contract, said St. Louis County Railroad Company had conveyed, or agreed to convey, to the St. Louis, Kansas City and Northern Railway Company, a portion of its said right of way through said park, as well as through all the lots and blocks then owned by it outside thereof; but that nevertheless, said St. Louis County Railroad Company retained for the use of its own railroad, a portion of all said lots and blocks, and being by its [character] authorized to construct and operate a railroad through said park, and from thence to Tayon avenue in said city, it did, as the party of the second part in said tripartite agreement, personally, and only for itself, agree, with said Park Commissioners, as follows, to-wit:

"Ninth. Said party of the second part (the St. Louis County Railroad Company) shall permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park, and up to the terminus of its road in the city of St. Louis, upon such terms and for such fair and equitable compensation, to be paid to it therefor, as may be agreed upon by such companies.

Defendants state that the covenant aforesaid was not made by or for the St. Louis, Kansas City and Northern Railway Company; that it was a personal covenant, and only related to such right of way as was retained and reserved by said County Railroad Company for use in the construction and operation of its own railroad; that said covenant was not attached to any grant made by said County Railroad Company; that it did not bind the grantees or assignees of said company, or any real estate or right of way conveyed, or to be conveyed, by said County Railroad Company to the St.
264 Louis, Kansas City and Northern Railway Company; and defendants are also informed and believe that said covenant on the part of said St. Louis County Railroad Company, with said comissioners, to permit other railroad companies to use its said right of way through said park and up to the terminus of its road in St. Louis, was void, for the reason that there was no consideration for the same, and because, said park commissioners had no power, under said act, to grant or give said railroad companies any thing as a consideration for said covenants.

Defendants further state, that by said tripartite contract, the grade of said railroad was approved by said park commissioners, and the manner in which the slopes and sides of said road were to be made and kept, through said park, was agreed upon, and by the 12th clause or section thereof, it was provided that said railroad companies should enter upon and en-

joy the right of way, and all the rights, privileges, immunities, powers, improvements and property belonging to, or vested in, or that might belong to or vest in the party of the second part (the St. Louis County Railroad Company), in, upon and through said park, in common, on the terms stated in said contract, previously entered into between said companies.

And it was also provided in said tripartite agreement, that in case said St. Louis County Railroad Company should forfeit its said rights, privileges and franchises, in, upon and through said park, by failing to pay one-half the cost of said improvements, as provided in the agreement previously entered into by said railroad companies, then said St. Louis, Kansas City and Northern Railway Company was not to be
265 excluded from said park, but said company, its successors and assigns, was to continue to have and enjoy all said rights, privileges, immunities, franchises, improvements and property, in and through said park, upon the terms in said contract set forth, continuously and for ever; and the defendants say that "the terms in said tripartite contract set forth," were therein defined to be "the terms" contained in the contract previously entered into between said railway companies, with only the additional undertaking on the part of said St. Louis, Kansas City and Northern Railway Company, to the effect that it would assume and perform all the covenants of said County Railroad Company with said Park Commissioners, with respect to the making of improvements in said park, excepting as to the building of a depot and switch therein, which were to be made by said County Railroad Company. The true intent and meaning of said twelfth clause or section of said tripartite contract being, that in case said County Railroad Company should forfeit its rights in and through said park, then the St. Louis, Kansas City and Northern Railway Company was not to be excluded therefrom, but was to continue to occupy the same under the terms of the contract previously made between said railroad companies, and not under the terms of said tripartite contract, except in so far as said St. Louis, Kansas City and Northern Railway Company assumed the covenants of said County Railroad Company therein contained, with respect to the making of certain improvements in said park.

And defendants further say, that the only rights, privileges, immunities, powers, improvements and property which
266 said St. Louis, Kansas City and Northern Railway Company was, in case of forfeiture, to have, hold and enjoy, subject to the terms of either of said contracts, were such as were within said park, and such as were to be entered upon and occupied by said companies in common, and that in no event

was anything outside said park included, or intended to be included, in said tripartite agreement.

Defendants state that afterwards, to-wit, on or about the 11th day of August, 1875, said St. Louis County Railroad Company, in pursuance of the agreement first aforesaid (the one between said railroad companies), for said consideration of $125,000, conveyed to said St. Louis, Kansas City and Northern Railway Company by deed of general warranty.

1st. A strip of land twenty-eight feet in width off the south side of its said right of way through the park, and a strip twenty-eight feet in width off the south side of all the other tracts and lots of land then owned by it, between the eastern line of the park and the then western limits of the city.

2d. A strip thirty feet in width off the south side of each tract or lot, then owned by it, between said western limits of the city and Tayon avenue.

3d. An undivided one-half interest in and to said right of way, as well as in and to all other rights, privileges, franchises, powers and immunities owned by or that might thereafter be acquired or owned by it, in, through or upon Forest Park, by any means or from any source whatever.

That by the terms of said deed, the conveyance of said tracts of land and rights of way was made subject to the
267 terms and conditions upon which the same had been granted to said St. Louis County Railroad Company.

Defendants say that none of said lots or tracts of land outside said park had been granted to said St. Louis County Railroad Company, on condition that it should permit other railroad companies to use the same, and that no such condition was, or is, contained in the deed made by said Griswold to said County Railroad Company in 1871, for a right of way through said tract then owned by him, but now contained within the limits of said park.

That immediately after said County Railroad Company had conveyed to said St. Louis, Kansas City & Northern Railway Company a strip 28 or 30 feet in width, as aforesaid, off the south side of all tracts and lots of land then owned by it between the north line of said park and Tayon avenue, in the city of St. Louis, the said St. Louis, Kansas City & Northern Railway Company proceeded to acquire from the then owners thereof, at its own expense, by purchase or condemnation, a right of way through all the remaining and intermediate lots, in such manner as gave said company a continuous right of way sufficient for the construction and operation of its rail-

road from said north line of said park to Tayon avenue in said city; and said company afterwards, in the years 1875 and 1876, constructed its railroad thereon, paying out, as defendants are informed and believe, in the construction of said line, and in the purchase and condemnation of said additional right of way, and as damages to real estate and property not taken, a sum in excess of one million dollars.

268 That said St. Louis County Railroad Company wholly failed to pay, on demand, to said St. Louis, Kansas City & Northern Railway Company any part of the cost of said railroad in and through said park, and elected not to pay the same, and that thereupon, at the expiration of two years from the date of said contract, said St. Louis, Kansas City & Northern Railway Company, in accordance with the terms of the agreement aforesaid, entered upon the sole and absolute possession and enjoyment of all said rights, privileges, franchises, powers, immunities, improvements and property, to the exclusion of said St. Louis County Railroad Company, its successors and assigns.

That afterwards, on or about the 10th day of November, 1879, said St. Louis, Kansas City & Northern Railway Company was, as alleged in the petition, consolidated with the Wabash Railway Company, under the name of the Wabash, St. Louis & Pacific Railway Company, and thereupon said consolidated company became, by force of the statute in such cases made and provided, seized and possessed of all the aforesaid real estate, railroads and property previously owned or possessed by said St. Louis, Kansas City & Northern Railway Company.

That afterwards, on or about the 1st day of June, 1880, said Wabash, St. Louis & Pacific Railway Company issued eighteen thousand bonds, negotiable for the sum of $1,000 each, due forty years after date, with interest at the rate of 6 per cent per annum, payable semi-annually on the first days of June and December in each year, and to secure the payment thereof said Wabash, St. Louis & Pacific Railway Company, on or about the date last aforesaid, conveyed to defendant,
269 the Central Trust Company, of New York and James Cheney, trustees, all its railroads, real estate and rights of way of every kind wheresoever situated, including the railroad, real estate and right of way through said park, and from the east line thereof to the Union Depot at Tayon avenue, in the city of St. Louis.

That [is] was and is provided in the mortgage or deed of trust aforesaid, that if said company should make default in payment of the principal or interest of said bonds, and such default should continue for a period of six months, then said

trustees might, by themselves, or by their superintendents or receivers, take possession of and manage and control said railroad and property, and collect all the rents, tolls, incomes and profits thereof, and after paying the operating expenses of said railroads and the taxes on said property, apply the balance to the payment of the principal and interest due on said bonds.

That said company made default in payment of the interest due June 1st, 1884, on the bonds aforesaid; that said default still continues, and that all interest accruing on said bonds since said date is now due and unpaid.

That on or about the month of May, 1884, said Wabash, St. Louis and Pacific Railway Company became insolvent, and filed its bill herein, asking your Honors to appoint receivers of all its said property, and that thereupon, defendants, Solon Humphreys and Thomas E. Tutt, were, by an order or decree entered herein, duly appointed receivers of all the railroads and property of said company, and in pursuance thereof they took possession of all the railroads and property aforesaid.

That said receivers are now in possession of said property under said mortgage, and for the benefit of the holders
270 of said eighteen thousand bonds, and the other creditors of said company; and defendants say that neither said bondholders, trustees nor receivers are privy to, or bound by, any agreement or contract made by said St. Louis County Railroad Company, with said Park Commissioners with respect to the use of its right of way through said park or elsewhere, by other railroads.

That as to the real estate and right of way in and through said park, conveyed, as aforesaid, by said County Railroad Company, to the St. Louis, Kansas City & Northern Railway Company, there is neither privity of contract nor privity of estate between the petitioners herein and the defendants herein, or any of them.

2nd. That as to the real estate and right of way lying between the eastern line of said park and Tayon Avenue, conveyed by the County Railroad Company to said St. Louis, Kansas City and Northern Railway Company as aforesaid, there is neither privity of estate nor privity of contract between the petitioners herein, and the defendants herein, or any of them.

3d. That as to the right of way and real estate outside said park, subsequently acquired by said St. Louis, Kansas City & Northern Railway Company by purchase and condemnation, as aforesaid, there is neither privity of estate nor privity of con-

tract between the petitioners herein and the defendants herein, or any of them.

Wherefore, in consideration of the premises, defendants say said contract of said St. Louis County Railroad Company with said Park Commissioners, concerning the use of its right of way by other railroads, ought not to be enforced, in equity, against the defendants herein, or any of them.

271 And defendants further say, that as to said ninth clause of said tripartite agreement, on which petitioners rely for the enforcement of the rights claimed by them—if the same shall be adjudged to have been obligatory and binding on said St. Louis County Railroad Company—there is nothing therein contained which entitled petitioners to have any relief in equity against the defendants herein, or any of them.

1st. Because the ninth clause of said contract only required the St. Louis County Railroad Company to permit other railroads to use its said right of way on such terms as might be agreed upon between it and other railroads desiring the use thereof, and it would be inequitable for your Honors to substitute the judgment of the court for the judgment of any party bound by said agreement.

2d. Because there was never any mutuality of obligation between said St. Louis County Railroad Company and other railroad companies desiring to use its said right of way.

Wherefore, defendants say the petitioners herein ought not to have any relief in equity, and especially that no writ of injunction ought to issue out of, or under the seal of this Honorable Court, as prayed for, restraining the defendants, or any of them, or their agents or servants, from refusing to permit said petitioner, the St. Louis, Kansas City & Colorado Railroad Company, from using said right of way through the park, and from thence to said Union Depot at Eighteenth street; and that no order ought to be made herein directing defendants, or any of them, to permit said St. Louis, Kansas City & Colorado Railroad Company to use said right of
272 way or tracks, on the terms prayed for, or on any terms whatever.

WELLS H. BLODGETT,
Solicitor for Defendants.

Warwick Hough & H. S. Priest, of Counsel.

United States of America,
Eastern District of Missouri—ss.

Wells H. Blodgett, solicitor for defendant herein, being duly sworn, says, that the several matters and things set forth in

the above answer, in so far as the same are stated on knowledge, are true, and in so far as stated on information and belief, he believes them to be true.

WELLS H. BLODGETT.

Subscribed and sworn to before me, this 21st day of August, 1886.

GEORGE M. BLOCK,
Notary Public.

273 United States of America,
Eastern District of Missouri—ss.

In the Circuit Court of the United States, for the Eastern District of Missouri.

Central Trust Company of New York, et al., Complainants,
vs. In Equity.
Wabash, St. Louis and Pacific Railway et al., Defendants.
Consolidated cause.

The Replication of the City of St. Louis, and the St. Louis, Kansas City & Colorado Railroad Company, Complainants and Intervenors to the answer of the Wabash, St. Louis & Pacific Railway Company, Thos. E. Tutt, Solon Humphreys, Receivers and the Central Trust Company, of New York and James Cheney, Trustees, Defendants.

274 These repliants saving and reserving unto themselves now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto; say, that they will aver, maintain and prove their said bill of complaint to be true, certain and sufficient in law to be answered unto, and that the said answer of the said defendants is uncertain, untrue and insufficient to be replied unto by this repliant; without this that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto and not herein and hereby sufficiently replied unto, confessed or avoided, traversed or denied, is true; all of which matters and things these repliants, are and will be ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly pray as in their said bill they have already prayed.

LEVERETT BELL,
Solicitor for City of St. Louis.

NOBLE & ORRICK,
Solicitor for St. Louis, Kansas City & Colorado Railroad Company.

DYER, LEE & ELLIS,
Of Counsel.

275 In the Circuit Court of the United States, for the Eastern District of Missouri.

The Central Trust Company of New York et al., Complainants,
No. 2357, No. 2464. vs. In Chancery.
The Wabash, St. Louis & Pacific Railway Company, et al., Defendants.
St. Louis, Kansas City & Colorado Railroad Company et al., Intervenors.

(Consolidated) Master's No. 279. Clerk's No.

Record of Proceedings before the Master.

This case having been re-referred to the Master in Chancery, with instructions on the 30th day of July, 1886, was set for hearing at the United States Circuit Court Room, in
276 the Custom House Building, in the City of St. Louis, State of Missouri, on the 30th day of August, at 10 A. M., and notices thereof were given to Messrs. Green, Burnett & Humphrey, Solicitors for the Wabash, St. Louis & Pacific Railway Company; Messrs. Phillips & Stewart, Solicitors for the Central Trust Company, of New York, and James Cheney, Trustees; Messrs. Dyer, Lee and Ellis, and Messrs. Noble & Orrick, Solicitors for the St. Louis, Kansas City & Colorado Railroad Company, Intervenor, and Leverett Bell, Esq., Solicitor for the City of St. Louis, Intervenor, and Wells H. Blodgett, Esq., Solicitor for the Receivers. A notice was sent to the office of H. T. Kent, Esq., Solicitor for the Wabash, St. Louis & Pacific Railway Company, but he was not found in the city.

On August 4th, 1886, the Intervenors filed an amended petition; on the 21st day of August, 1886, the defendants in the suit, by their Solicitor, Wells H. Blodgett, Esq., filed an answer in the case, and on the 1st day of September, 1886, the Intervenors filed a general replication.

On August 30th, 1886, at 10 A. M., the Master was at the appointed place, but owing to stipulation between counsel for the intervenors and counsel for the defendants, the case was continued until the 7th day of September, 1886, and afterwards, upon being notified that the parties were ready to take the case up on the 2nd day of September, the continuance to the 7th was set aside and the case set for hearing at 2 P. M. September 2nd, 1886.

On September 2nd, 1886, the case coming on to be heard, there were present the Master, John C. Orrick, Esq., representing the Intervenors, and H. S. Priest, Esq., representing the defendants.

277 It being questionable, owing to the change of the time of the hearing of the case by stipulation whether the report of the Master can be filed in accordance with the order of Court, on the 8th of September, it is understood by the parties, that the Master is to file his report as soon as possible, and that exceptions by either party are to be filed within three days after notice of the preparation of the report by the Master, so that the matter can be disposed of during the early days of the coming term, while Judge Brewer is on the Bench.

Counsel for the intervenors offers in evidence a certified copy of the Charter of the St. Louis, Kansas City & Colorado Railroad Company, and in connection with it the Statutes of Kansas in reference to the incorporation of railroad companies.

Counsel for the intervenors offers in evidence a copy of an agreement made on the 9th day of October, 1872, between the Forst Park Commissioners and the St. Louis County Railroad Company.

Counsel for the defendants objects to the same as not being sufficiently authenticated, either as to its certificate of accuracy or execution, to allow its introdution as a copy, and also as not being recorded and no knowledge being shown in the St. Louis, Kansas City & Northern Railway Company at the time of acquiring the property from the St. Louis County Railroad Company.

Counsel for intervenors states that he does not know whether he can show actual knowledge on the part of the St. Louis, Kansas City and Northern Railway Company of the agreement, and the Master receives the paper subject to objection, to be passed on hereafter.

278 Counsel for the defendants admit that the whole of Forest Park is in the city limits of the city of St. Louis, and is administered and has been since about 1876, by the Park Commissioner, as a part of the City Government.

At this point the further hearing of the matter was adjourned until 2 P. M., September 3, 1886.

Pursuant to adjournment, as above stated, on September 3, 1886, the intervenors appeared by J. C. Orrick, Esq., and the defendants by H. S. Priest, Esq., and the hearing of the matter was resumed.

James W. Paramore, being duly sworn on the part of the Intervenors, testifies as follows:

Direct Examination

By Mr. Orrick:

Q. What has been your business for several years past?

A. Well, it has been railroading for about seven years, or for most of ten years.

Q. With what road were you connected and in what capacity?

A. I was connected since I have been in Missouri with the Texas & St. Louis; I constructed it and was president of it for six years.

Q. Were you connected with railroads at any time prior to that?

A. Yes sir, I was president of the Tennessee & Pacific in Tennessee before I came here and operated it for four years.

Q. Do you know the location of the Wabash road from the Union Depot out west to Ferguson in St. Louis county?

A. Yes, sir; I have been over it.

Q. How long have you lived in St. Louis?

A. About thirteen years.

Q. From your knowledge and experience in operating railroads, will you please state where one railroad has made
279 a contract to permit other railroads to use its right of way and track at its terminus, for instance the Wabash road from the north line of Forest Park to Eighteenth street, for such compensation as may be reasonable and just, what would be a reasonable and just compensation under such a contract for the use of the right of way of the Wabash Road between the north line of Forest Park and Eighteenth street?

Counsel for defendants objects to the question as not conforming to the facts in the case; objection overruled, defendants except.

A. Well, if you admit the right of other railroads to run on this track, as already conceded, then the only proper basis to get at the compensation in my opinion would be a wheelage basis.

Q. How about the cost of maintenance, how would that be divided?

A. My rule of getting at that would be to take the cost of construction and then the cost of maintenance of that portion of the road and divide the interest on the cost of construction and the cost of maintenance between the two roads in proportion to their use; I think that is the only equitable basis you can get at, if you admit the other road has the right to run cars on it, the right to the use of it.

Cross Examination

By Mr. Priest:

Q. In what capacities have you been connected with the operation of railroads?

A. I have been President and General Manager. I have had charge of the operations of roads as well as the construction.

Q. Have you had the immediate charge of the operations
280 of roads or have you conducted the operations of a road through a superintendent?

A. Sometimes I had a superintendent and sometimes I had not.

Q. Did any of the roads with which you were connected have occasion to make contracts for the operation of their trains independently over a part of the line of any other railroad?

A. Yes sir, the Tennessee & Pacific which is a branch of the Nashville & Chattanooga, ran from the south line of the city on the Nashville & Chattanooga tracks.

Q. To what extent?

A. About a mile, something over a mile; a mile and a half probably.

Q. Did they do that under a contract? A. Yes, sir.

Q. Were the two roads allied together in any way in their operation at that time? A. Not at all at that time.

Q. By the interchange of traffic or otherwise?

A. We interchanged some traffic, of course, but not to any great extent.

Q. They were not competitors?

A. No, sir, I could not say they were competitors.

Q. What was the basis of their running arrangements in that case?

A. I think all they charged us was just simply our proportion of the cost of maintenance. I don't think they took into consideration the cost of construction at all, but that was regarded by them and by me as more favorable terms than usual.

Q. What other instance do you have in mind?

A. I do not know that I can think of any other instance now but there are plenty of such cases.

Q. Coming under your observation?

A. Not exactly, but they are familiar to all railroad
281 men. Wherever they make a running arrangement I think those are the terms they all make.

Q. I want you to speak from your individual knowledge, your personal knowledge of the matters, and not from rumors?

A. That is the only instance that has come within my personal knowledge, only as a matter of common report.

Q. Suppose that you owned a part of a line of railway some

four miles in length, comprising the principal part of your terminal facilities into a large metropolis, that it cost you in the neighborhood of a million and a quarter to a million and a half of dollars, and you were about entering into arrangements for another railway to run its trains independently of your management over that portion of your road, what, in your opinion, under circumstances of that kind, would be a reasonable compensation for the plant as well as the privilege of operating over the road?

A. I don't understand the question exactly. It would contemplate, you mean, to sell the plant?

Q. No sir.

A. As I understood the question in the first place it did not contemplate to interfere with your use of it at all?

Q. No sir, that is not my question. My question is there just as I put it. You take into consideration the plant, the cost of the plant, the fact it is the only means of access or egress from a metropolis and it is the principal terminus of your road, and another road is to operate its trains independently of your management, furnish the motive power, the employes and all equipments?

A. Well, that would turn on the question of whether I had the right to keep them off the piece of the road or not.

282 Q. I am not speaking of that right. I say, taking those facts into consideration, what would be a reasonable compensation if you were to make a contract for a road to take a road costing this amount and entering a metropolis such as this is, what, in your opinion, would be a fair compensation for such a use by the road?

A. I do not think I can answer the question any better than I answered the original question, take into consideration the cost of the construction which can be gotten at with reasonable certainty, the cost of maintenance, and then each of the lines will pay its proportion in proportion to its use.

Q. Well, you would give the Company owning the road no compensation for its plant whatever?

A. Give it the interest on the cost of construction, that is all that roads ever get.

Q. Give it the interest on the cost of construction?

A. Make that a part of the cost.

Q. Is not that interest consumed by the wear and tear of the other road operating over it?

A. It is repaired and kept up by the maintenance, the maintenance is a part of the repairs.

Q. What interest would you allow?

A. That is the question—usually six per cent, some allow five per cent.

Q. What do you mean by usually in that sense?

A. Nearly all railroad bonds of construction are six per cent bonds.

Q. Have you any knowledge of the cost of operating over the Union Depot tracks in St. Louis?

A. No, sir, I have not, I have never seen any figures.

Q. Have you any knowledge of what the Wabash pays for its access over the lines of another road into Chicago?

A. No sir.

283 Q. Or Quincy? A. No sir.

Q. Or Kansas City?

A. No sir, I have no definite knowledge of that, but those things are generally regulated by the power the road has got. If it has got the power to charge you an arbitrary compensation it generally does it. If it has not the right to do it under its charter or its contract with other roads then it has come to an equitable basis.

Q. What instance have you in mind illustrating the difference between these two propositions which you state?

A. Take the San Francisco and the Missouri Pacific here, they claimed they had the former road in its power and they charged it what I would consider a round sum to come in on their tracks.

Q. Do you know what they paid?

A. I could not give you the figures, I have heard the figures discussed between railroad men often.

Q. Have you heard it discussed between the officials of the two roads, the Missouri Pacific and the San Francisco?

A. I do not know whether between the officials of the two roads, together, but I have heard it discussed by the officials of both of those roads.

Q. You do not know what they charged?

A. I would not pretend to give the figures.

By the Master:

Q. I would like to ask you two or three questions. You put the basis of the division of interest on the cost of construction. Suppose that the value of the property had largely increased between the time of its original construction and the time at which the other road seeks to use the track; would you limit in that case the interest on the cost of construction or place it on the basis of the actual value of the plant?

A. Well, I should think the actual cost of construction,

284 if the right to run on the road was conceded, would be on the original cost of construction, that the increase in value had nothing to do with it.

Counsel for defendants moves to exclude the testimony of the witness on the ground that he has not shown himself competent

to testify in the matter, and the Master denies the motion; defendants except.

The Master sustains the objection to the contract between the Commissioners of Forest Park and the St. Louis County Railroad Company, dated October 29th, 1872, which was offered in evidence yesterday, on the ground that it is not properly authenticated.

E. H. Brown, sworn on the part of the Intervenors, testifies as follows:

Direct Examination

By Mr. Orrick:

Q. You are the Vice-President of the St. Louis, Kansas City & Colorado Railroad Company? A. Yes sir.

Q. Will you state whether the line of the St. Louis, Kansas City & Colorado Road has been located from Forsyth Junctoin to Forest Park? A. Yes sir.

Q. When was it, prior or since the filing of these proceedings? A. Prior to the filing of the proceedings.

Q. How is it located?

A. It crosses the Wabash and follows on the north side.

Q. At Forsyth Junction?

A. At Forsyth Junction and goes on the north side of the park.

Q. Please state what proceedings, if any, have been taken to acquire the right of way from Forsyth Junction to the north line of the park?

285 A. The company has commenced proceedings to condemn the right of way.

Q. And they are now pending? A. Yes sir.

Cross Examination

By Mr. Priest:

Q. You mean the line has been only surveyed?

A. No sir.

Q. Has it been definitely located and determined upon?

A. That is my understanding.

Q. From whom did you derive that information?

A. I understand from the engineer.

Q. From whom do you derive the understanding?

A. That is the action of the company, there are proceedings in condemnation.

Q. Condemnation against whom?

A. Against the parties.

Q. What parties? A. From Forsyth Junction.

Q. What are the names of the parties?

A. I do not know.

Q. Have you ever seen the petition that was filed, how do you know you have begun condemnation proceedings?

A. I have seen the petition, I have not read it, I have read a portion of it.

Q. Do you know it has been filed?

A. I know the company has ordered it done.

Q. Have you ever been over the ground and seen the location made by the engineer? A. No sir.

Q. Or the company with him? A. No sir.

Q. The only information you have of it is from the engineer?

A. I know the fact that the company ordered it done, I know that from the engineer having done the work. I have seen the profile of the line run and located by him and
286 know that proceedings in condemnation have been commenced against the parties between those points.

Q. Whom did you learn that from, that proceedings in condemnation had begun?

A. I know the company ordered it done.

By Mr. Orrick:

Q. Did you see the publication in the paper?

A. I do not know whether I have or not.

Julius Pitzman, sworn on the part of the Intervenors, testifies as follows:

Direct Examination

By Mr. Orrick:

Q. You have been examined before in this case as to the valuations of the right of way? A. Yes sir.

Q. How long have you resided in St. Louis?

A. Since 1854.

Q. What experience, if any, have you had in gaining a knowledge of the values of real estate in this city, say between Eighteenth street and the north line of Forest Park along the line of the Wabash railway?

A. In 1863 I was elected County Surveyor of St. Louis County and it was my duty to act in that capacity as Commissioner in all suits of partition. I held that office for nine years, and of course I posted myself as to the value of property in general in the entire city of St. Louis. I was afterwards called upon by the railroad companies in almost all large cases to act as Commissioner in condemnation proceedings for the condemnation of property for railroad purposes. I have acted as Commissioner for the St. Louis & Iron Mountain, for the Missouri Pacific, and for the Wabash.

287 Q. On this very line mentioned?

A. Yes sir, I not only acted on the Wabash as Commissioner by appointment of the court, but Charles Green, who

was the agent to make the purchase for Ben Lewis, the President of the Wabash, could not come to terms with a number of people who owned land along the line of the road, and Mr. Lewis and Mr. Green told me to go and buy the property, they leaving the question of prices to a great extent to my judgment in the matter.

Q. Now, you have examined the line of the Wabash from Eighteenth street to the north line of the park and know where it is? A. Yes sir.

Q. Will you please state to the court what is the present value of the right of way of the Wabash, covering, say sixty feet wide from Twenty-First street to the park and through the park to the north line thereof, the right of way being forty-two feet wide in the park and one other sixty feet down to Twenty-First street?

A. Sixty feet from the west side of Mercer to the park, and forty-two feet wide through the park?

Q. Yes, sir.

A. Considering it is saleable property, the lots, I would consider the highest market value of the property to be $489,932.

Cross Examination

By Mr. Priest:

Q. You testified once before in this case? A. I did.

Q. Is the estimate you now make any different from the estimate you made while on the stand before?

A. No, sir; except in this case that the question omitted property between Tayon avenue and Mercer, and added the right of way through Forest Park and thirty feet wider. The question was differently formed. It is based on the
288 same valuation, the bulk of it being the same property.

Q. Is the valuation this time larger than before?

A. No, sir; precisely the same, only the quantity of land to be valued is doubled.

Q. What, in your opinion, would is cost a railroad company to acquire a right of way through this property adjacent to the Wabash Railway from the north line of Forest Park to Eighteenth street?

Counsel for the intervenors objects to the question as incompetent; objection overruled, intervenors except.

A. I could not give the precise amount because it would take a number of buildings, and I would not undertake to pass upon that without going along the line and determining the value of each building.

Q. Would it cost in the neighborhood of one million dollars?

A. Sixty feet wide?

Q. The same width as the Wabash?

A. I think it would take the shot tower and the Pullman Palace Car shops.

By Mr. Orrick:

Q. Not next to Wabash?

A. Yes, that is the next to the Wabash; you see I cannot tell precisely how the buildings stand with reference to the line. In making the valuation I have given the full value, and you may safely say the valuation I have made includes the damages to the remainder, so the only thing to be added to my valuation would be the destruction of the buildings along the line, and I should not be at all surprised that the damage to buildings would run to a quarter of a million dollars, and the damage to the remainder of the improved property I think one half a million would be too much, I think a quarter
289 of a million would amply cover it.

By Mr. Priest:

Q. You think it would cost from $750,000 to $1,000,000?

A. No, I would make it from $489,000 to three quarters of a million.

L. B. Jones, sworn on the part of the Intervenors, testifies as follows:

Direct Examination

By Mr. Orrick:

Q. You reside here in the city? A. Yes sir.

Q. What is your business? A. Real estate.

Q. What familiarity have you with property from Eighteenth street to the north line of Forest Park along the line of the Wabash Railroad?

A. I have assisted in purchasing upwards of a million dollars worth of property, probably over that, for the Bridge Company, or rather the Union Depot Company or the terminal railway.

Q. You have made a specialty of that business?

A. Yes, sir; I have done nothing else for the last ten years.

Q. Did you make an estimate of this strip of ground, say sixty feet wide from Twenty-first street to the east line of the park, and forty-two feet through the park to the north line thereof with Mr. Pitzman who just testified? A. Yes, sir.

Q. Now, from your knowledge of values at the present time, please state to the Court what would be the value of that strip of ground?

A. Well, we made the same estimate precisely in figures, simply doubled it, from thirty feet to sixty feet, doubled the price—the same figures and the same paper were used. I have the same figures added to the same estimate we made before.

Q. Who is in possession of that property if you know,
290 between Eighteenth and Twenty-first street on the north side—that is, between Tayon Avenue and Mercer street?

A. I understand that belongs to the terminal railroad company, or rather the Transit Company, or at least the Bridge Company and the Wabash. Now, how much belongs to the Wabash and how much to the Transit Company, I do not know. You see here is a strip marked—

Q. Where is the Anchor milis? A. Twenty-first street.

Q. Isn't that property used in connection with the Anchor mills?

A. That is adjacent to the Anchor mills. This in red belongs to the Bridge Company.

Q. That is what I am talking about, that which is in red?

A. Yes, sir; this is occupied by coal cars and switching to the Anchor mills.

Q. It is not used by the Wabash?

A. I don't think it is, I am not positive; I always understood that was for the Bridge Company's tracks.

Q. Their right of way is only thirty feet from Eighteenth street to Twenty-first?

A. Yes, sir; that is what I have always understood.

Q. $477,000, is that the estimate?

A. We estimated it is worth that, from that to a half million dollars to be liberal.

Q. What were your figures, have you got a memorandum there?

A. Yes, sir; the same figures, $489,932, putting it on the basis of the other three, say $500,000.

Q. Are you acquainted with the tracks of the Wabash Road from Ferguson to North Market street and down on the river side of the city?

A. No, sir, I am not; I have never paid any attention to anything up on the river.

291 Q. Do you know whether the Wabash brings any of its traffic in on any of those tracks?

Defendants' counsel objects to the question as incompetent; objection sustained, intervenors except.

Cross Examination

By Mr. Priest:

Q. What would it cost a railroad to acquire a right of way from the north line of Forest Park into Twenty-first street through this same propety adjacent to the Wabash, in your opinion.

Counsel for the intervenors objects to the question as incompetent; objection overruled, intervenors except.

A. Well, I do not think they could do it.

Q. I don't ask you about the possibility, I ask you what it would cost?

A. I do not know; as a matter of course I am not a judge, but I would say they could not do it.

Q. Why? A. Because it belongs to the Frisco.

Q. On the north side?

A. Yes, sir; to Twenty-third street.

Q. Taking now the possibility and leave out of consideration the Frisco road?

A. I would say a quarter of a million dollars would cover the value of the houses.

Q. Did you have any conversation with any one else in regard to this and the probabilities of the cost of a new road from Forest Park into the Union Depot in which you placed the estimate in the neighborhood of a million of dollars to a million and a quarter?

A. On the basis of 120 feet deep, yes sir, I think it would; I think it would cost twelve hundred thousand dollars 120 feet deep, taking the houses, the shot tower, the Palace Car Company and the malt house, on the basis of 120 feet. 60 feet, I do not think it would cost over a quarter of a million dollars extra on that basis.

292 Q. Does that include the damage done the other property?

A. I should say so, but, as I say 120 feet, that is a different thing. We based this on 120 feet deep and a half of that value for 60 feet.

Q. Why do you estimate it 120 feet in depth?

A. The lots average about that in depth.

Q. Why do you estimate that as the average depth of the lots?

A. That is the question I was asked, what lots were worth 120 feet deep, that was the question I was asked. We were also asked about sixty feet and we gave the price at half the value. What the buildings would cost I could not tell until I bought them, but I should not think a quarter of a million, but, if you were compelled to take the whole 120 feet which in some places you might be, and in some you might not, I think it would cost a million to a million and a quarter, taking the houses and all. In a great many cases you would not have to take all.

At this point the further hearing of the matter was adjourned until 11 A. M., September 4th, 1886.

Pursuant to adjournment, as above stated, on September 4th, 1886, the Intervenors appeared by John C. Orrick, Esq.,

and the defendant by H. S. Priest, Esq., and the hearing of the case was resumed.

H. W. Gays, sworn for Intervenors, testifies as follows:

Direct Examination

By Mr. Orrick:

Q. Where do you reside? A. In St. Louis.

Q. What is your business now?

A. Manager of the Wiggins Ferry Company and the leased lines.

Q. What was your business prior to that time?

A. For twenty-six years I have been connected with railroads.

293 Q. What position did you occupy prior to your position with this Company?

A. General freight agent of the Indianapolis & St. Louis Railroad.

Q. Here at St. Louis? A. Yes, sir.

Q. From your experience are you more or less familiar with the operations of railroads? A. I am.

Q. You have been connected with them you say for twenty-six years? A. Twenty-six years.

Q. What lines has the Wiggins Ferry Company?

A. The East St. Louis Connecting Railway and it operates the Venice & Carondelet Belt.

Q. You are the manager? A. Yes, sir.

Q. I will ask you to state from your knowledge of railway operations and business what would be a fair and equitable basis for one connecting road to charge another for the use of its right of way, as, for example, the Wabash, St. Louis & Pacific Railway from the north line of the park in this city to Eighteenth street upon the hypothesis that there is a contract existing whereby the Wabash, St. Louis & Pacific Railway Company is bound to permit other roads to use its right of way between the points named for a fair and equitable compensation?

Defendant's counsel objects to the question for the reason that the witness has not shown himself conversant with railroad matters in the particular concerning which it seeks to elicit his opinion; objection sustained.

Q. I will ask you to state whether in your experience in connection with roads you know of any cases where one road has used the track of another for coming into the city of St. Louis, or East St. Louis, and if so, what road and on what terms?

A. The C., B. & Q. comes into East St. Louis over the
294 Indianapolis & St. Louis Railroad.

Q. How far? A. Twenty-two or twenty-four miles.

Q. Does the I. & St. L. own all the terminals they use in East St. Louis?

A. Yes, sir, that is the C., B. & Q. has no use of terminals, only their water and side track for the purpose of passing trains, they have no use of terminals for the conduct of their own business.

Q. Your terminals are similar to those of the Union Depot here, they are independent? A. Yes, sir.

Q. I will ask you whether the Wabash has the use of the Union Depot terminals, whether they own them or they are a separate institution?

A. They are a separate institution between the Wabash and Union Depot.

By the Master:

Q. Are you sufficiently acquainted with the terms upon which one road runs over the track of another as to compensation, to give an opinion as to what would be a fair and reasonable compensation for the use of the track of one road by another?

A. I would hate to pass judgment on my own ability. I have had the knowledge of twenty six years in the railroad business in all departments and have had more or less to do with making arrangements of that character. As to my opinion of the value to be placed on it I have nothing to do with that at all.

The Master rules that the witness is qualified to answer the question propounded by Mr. Orrick.

Q. Please answer my first question?

A. My knowledge, I will state beforehand, is to this extent. In the case of the Q. that matter was worked up and gone over by me, and it was on my recommendation that the con-
295 tract was executed by the officers of the Company who were the proper ones to execute such a contract.

Q. Now answer my first question. What would be a fair basis under the facts I have supposed?

A. In addition to that you mention the right of way. Do you mean the use of tracks?

Q. The use of tracks; what would be a fair basis for the use of that track per annum, and on what basis should the compensation be arrived at?

A. Under the contract it takes the power away from the road to obtain the best terms it can. The expenses of all character, the capitalization of the whole thing should in my judgment be divided on the traffic revenue, whatever that might be.

Q. What is that otherwise called?

A. Either tonnage or wheelage, or whatever is a unit that can be arrived at.

Q. The wheelage basis? A. Yes sir.

Defendant's counsel objects to this examination; objection overruled.

Q. What is that based on?

A. On the freight, the total amount of traffic is arrived at from the reports of the transactions of each road over that particular piece of road, that is one way to arrive at it, on the freight business, and the number of passengers carried is compared; that practically throws it on the revenue, and another basis is the wheelage basis to count the number of cars. It is difficult to arrive at it on the passenger business.

Q. State whether there is any substantial difference in those two basis?

A. The difference in that respect would be this, that by counting the cars you would have it absolute, that it is in the wearing out of the track and the conduct of the affairs pertaining to the track.

296 Q. What were the terms of the C., B. and Q. contract?

A. Well, the terms of the contract is that they pay ten cents per ton for all freight passing over the twenty-four miles.

Q. How many tons in a car?

A. That varies from ten up as high as twenty-five. The average I should say would probably be twelve tons with the Q., because they are heavily loaded with grain and ice. There is no charge for empty cars.

Q. Then on the tonnags basis there would be no charge for empty cars?

A. Not on the Q., there is no charge there.

Q. In speaking of a tonnage basis?

A. No, there would be no charge because there could not be.

Q. There would be on the wheelage basis?

A. Yes sir, each car would then represent a value.

Q. Then where the compensation is to be fair and equitable, which in your opinion, would be the most equitable, a tonnage or wheelage basis, with reference to the wear and tear of the track?

A. I should prefer to have it on the wheelage for the reason that is absolute.

The Master: It is a question of fairness and an equitable arrangement between roads and not a preference that Mr. Orrick is after.

By Mr. Orrick:

Q. Which is the most equitable?

A. The only equitable way is to put it on wheelage, each car paying its proportion.

Cross Examination

By Mr. Priest:

Q. You have been you say twenty-six years connected with railways in various official relations? A. Yes sir.

297 Q. What official relations and with what roads?

A. I was on the Indianapolis & St. Louis for about four years as General Freight Agent on the Cleveland, Columbus, Cincinnati & Indianapolis about two years as Assistant General Freight Agent, and prior to that time I was General Agent.

Q. General Freight Agent?

A. Assistant Freight Agent of the Bee Line and General Freight Agent of the Indianapolis & St. Louis. In saying twenty-six years with railroads it was hardly right to express it that way, although when connected with the river I attended to their railroad business for them. I was there about eight years. Prior to that I was with the Buffalo & Erie, and prior to that with the Erie.

Q. What position with the Buffalo & Erie?

A. Cashier with the Buffalo & Erie at a transfer station, and with the Erie Railway I was telegraph operator and train dispatcher in the Superintendent's office.

Q. You say you had charge of some river business; what river business?

A. I had charge of the traffic of a line of boats that ran between Louisville and Cincinnati some years.

Q. How long have you been connected with the Wiggins Ferry Company as General Manager?

A. Since June. Prior to that time I was there as Superintendent.

Q. June of this year? A. Yes sir.

Q. How long as Superintendent?

A. I went with them last year, 1885.

Q. What were your duties as General Freight Agent and Freight Agent with the several companies you have mentioned?

A. On the Indianapolis & St. Louis I had charge of their freight traffic of all kinds, and on the C. C. C. & I., as

298 Assistant Freight Agent I had charge of all their traffic, reporting to the General Manager.

Q. Did your experience in either of those positions give

you an oversight or any experience in the management of the transportation department?

A. Yes sir, on the C. C. C. & I., and more especially the Indianapolis and St. Louis.

Q. What did you have to do with train service, the maintenance of track, and contracts regarding operations over its line of railway?

A. The maintenance of track is another question entirely, I did not mention that. As General Freight Agent anything in the transportation department that affected the freight business I had something to do with.

Q. So far as fixing rates?

A. The general movement of property or any contract affecting it, or where other roads sought access over that road.

Q. What other roads besides the C. B. & Q., used any portion of the Indianapolis & St. Louis?

A. The Q. is the only one here.

Q. How many contracts of that kind did you have occasion to become connected with or assist in making during all your experience as a railroad man?

A. The Q. contract was the most direct, although with the C. C. C. & I., in the case of the Atlantic & Great Western, where they reach Cincinnati over fifty-six miles of that track, similar questions came up.

Q. Did you have anything to do with adjusting the terms on which the arrangements were made? A. Yes sir.

Q. What arrangements were made?

A. In the case of the Atlantic & Great Western?

299 Q. Yes.

A. Finally it was settled that the traffic was settled on a percentage basis of the revenues on the traffic.

Q. Now, in the only two instances in your experience as a railroad man where a case similar to that supposed to you by Mr. Orrick occurred, the arrangement was made entirely on a different basis from that which you have testified would be a fair and reasonable basis?

A. Yes sir, because the element in the case of the Q. was that they sought entrance over our tracks without a previous contract.

Q. Then you make a distinguishing feature in your testimony of one element with which you have had no previous experience whatever?

A. That is the element of a previous contract, yes sir.

Q. You never made an arrangement where one railroad had a right by a previous contract to go over the line of another?

A. No sir.

Q. So that element in the hypothetical question is an entirely novel one to you, and you are giving your impressions as any man would on the question being presented to him?

A. I do not know as any man would. I am giving you my opinion.

Q. You do not pretend to be an expert about that element of the hypothetical case propounded to you by Mr. Orrick?

A. I am no expert on anything.

Q. Now, so far as your experience extends concerning such contracts as those, they depend altogether upon the individual judgments of the parties to the contract and the status of their property with reference to each other?

A. As I understand the one party in seeking—

300 Q. I am not asking you about this particular case, you misapprehend my question?

A. As I understand you, your question is with regard to the two instances I have cited?

Q. Yes sir, the Q. and Atlantic?

A. Yes sir, in which case the element of a previous contract did not exist, if that is the answer to your question.

Q. In those two cases the contracts were not alike?

A. No sir.

Q. They differed? A. Yes sir.

Q. They depended upon the individual judgment of the parties to the contracts? A. Yes sir.

Q. As to what would be fair in their minds?

A. Yes sir, that was the state of affairs.

Q. So then so far as your knowledge as an expert extends, there is no usual or customary basis for the making of such contracts? A. I am not an expert.

Q. Mr. Orrick says you are?

A. I am not an expert in making contracts. I cite you the two cases we did make and give you my opinion as to what would be fair.

Q. In giving your opinion as to the proper basis of compensation as to this particular case, you are not giving that opinion as an expert but simply giving your opinion as an individual man?

A. Based on the experience of twenty-six years handling property of corporations.

Q. Then you are testifying as an expert?

A. To that extent.

Q. Then your experience is that there is no usual or uniform contract concerning such running arrangements?

A. I do not quite understand that.

Q. That question seems to be plain to me?

301 A. If you will just repeat it, may be I can understand what you refer to.

Q. Then your experience as a railroad man is that there is no usual or customary basis for the making of such contracts, that the contracts vary and differ in their considerations as the circumstances and relations of the parties differ?

A. Did you refer to the two contracts of the Atlantic and Q?
Q. No, I am referring to a general experience?
A. My general experience is so far as I know that contracts come up right on their merits.
Q. Depending upon the circumstances?
A. Yes sir, unless there was a previous contract which changes all that and does not give the contracting parties power to act for themselves.

By Mr. Orrick:
Q. In other words, where there is no previous contract it is arbitrary?
A. It is agreed to as between the parties, it comes right up on its merits and the party who has the road tries to get all he can out of the party who tries to use it.

Eugene Haas, sworn for Intervenors, testifies as follows:

Direct Examination

By Mr. Orrick:
Q. What is your occupation?
A. I am a book-keeper and clerk of the Park Commissioners of this city.
Q. How long have you been employed there in connection with the Park Commissioners? A. Since September, 1877.
Q. Will you please state how long to your knowledge this paper has been on file in the Park Commissioners' office?
302 A. Ever since I have been clerk. When we moved the office it was taken from a large safe to a smaller one.
Q. Did you find it there when you went there?
A. I found it there when I made an inventory of all the papers in the safe. I have the inventory yet, I numbered them.

(The paper referred to by the witness is a paper purporting to be a contract between the Commissioners of Forest Park and the St. Louis County Railroad Company, dated October 29th, 1872).

Counsel for Intervenors offers in evidence under the following stipulation an abstract of the Sterling & Webster Abstract Company, marked Exhibit D:

"It is stipulated and agreed between the parties hereto as follows:

First. That the several lots or tracts of land indicated in red on Chart A and marked "Grover," were obtained by the St. Louis, Kansas City & Northern Railway Company through the several conveyances mentioned in the certificate of the Sterling & Webster Abstract Company, which certificate is admitted in evidence and marked Exhibit D.

Second. It is admitted that the several lots and tracts of land now constituting defendants' right of way between Forest Park and the Union Depot not indicated in blue or marked "Grover" on Chart A, were obtained by the St. Louis, Kansas City & Northern Railway Company from divers persons
303 by purchase and condemnation, as stated in defendants' answer, but as to the cost thereof no admissions are intended to be made by the parties.

(Signed) NOBLE & ORRICK,
Solicitors for Intervenors.

H. S. PRIEST,
For Defendants.

At this point the further hearing of the matter was adjourned until 10 A. M. September 6th, 1886.

Pursuant to adjournment, as before stated, on September 6th, 1886, the hearing of the case was resumed as follows:

The following stipulation was offered in evidence and same was marked Exhibit "E":

"It is hereby stipulated that said St. Louis, Kansas City and Colorado Railroad Company duly located its line of road in the City of St. Louis on the .... day of May, 1886, and that said line crosses the said Wabash, St. Louis & Pacific Railway at Forsyth Junction in said city, thence along and adjoining the north side of the right of way of said Wabash, St. Louis & Pacific Railway to the northern line of Forest Park, in said city, and on the .... day of August, 1886, proceedings to condemn a right of way forty feet wide on said line were duly filed in the Circuit Court of the City of St. Louis by said St. Louis, Kansas City & Colorado Railroad Company, against the owners of the land between Forsyth Junction and the northern line of said Park, and such proceedings are now pending.

"It is further agreed and stipulated that there shall be deemed and considered in evidence in this cause so much of the
304 record in the principal cause, entitled, 'The Central Trust Company, of New York, et al. vs. The Wabash, St. Louis & Pacific Railway Company, et al., as either party may consider relevant to the issues herein."

(Signed) NOBLE & ORRICK,
Solicitors for Intervenor.

H. S. PRIEST,
For Defendants.

This was all the testimony introduced by Intervenor in chief.

Defendants, to sustain the issues upon their part, offer evidence as follows:

Wells H. Blodgett, sworn for the defendants, testifies as follows:

Direct Examination

By Mr. Priest:

Q. Were you connected in any way with the construction of the line of the St. Louis, Kansas City and Northern Railway Company, now the Wabash, from Ferguson Station through Forest Park to the Union Depot?

A. I was at that time the general attorney of the St. Louis, Kansas City & Northern Railway Company and had charge of the matter of acquiring the right of way, that is of the condemnation proceedings and of the prepartion of all of the deeds and conveyances where property was purchased from parties without condemnation.

Q. Do you know from whom the St. Louis, Kansas City & Northern Railway Company acquired any portion of the
305 right of way for its railroad between the points just mentioned?

A. It acquired a portion of the right of way through a conveyance from the St. Louis County Railroad, which is in evidence in [his] case, marked Exhibit C, and then it obtained the remainder from a great many different persons owning small tracts or small interest in the tracts. I could not give the names of the parties.

Q. Look at the paper I now hand you and state what it is?

A. This is a copy of the articles of association of the St. Louis County Railroad Company as certified by Mr. McGrath, Secretary of State.

Q. State on what date that Company was organized?

A. It appears from that certificate that the company was organized on the 25th day of August, 1871.

Defendants' counsel offers in evidence the paper referred to and same was marked Exhibit F.

Q. Do you know of any deed having been executed to the St. Louis County Railroad Company for a right of way through what is now Forest Park?

A. I know of a deed having been made to the County Railroad by Mr. W. D. Griswold.

Q. Look at this paper and state what it is?

A. It purports to be a certified copy of a deed executed November 3rd, 1871, by W. D. Griswold to the St. Louis County Railroad Company for a right of way 40 feet in width, through what is now Forest Park. This purports to be a copy of the deed as of record in the Recorder's office of the City of St. Louis, certified by D. H. McAdam, Recorder.

306 Q. What is the date of that deed?
A. I stated before November 3rd, 1871.

Defendants' counsel offers in evidence the deed referred to and same was marked Exhibit G.

Q. You are at present general solicitor for the receivers of the property of the Wabash, St. Louis & Pacific Railway Company? A. Yes sir.

Q. Who is now operating the Wabash, St. Louis and Pacific Railway Company and how long have they been operating it?

A. The road is now operated by Solon Humphreys and Thomas E. Tutt, receivers under the order of this Court, dated May 27th, 1884. Since that date the property has been in the hands of and operated by Humphreys and Tutt as receivers.

Cross Examination

By Mr. Orrick:

Q. Did you represent the St. Louis, Kansas City & Northern Railway Company in its negotiations which led up to the agreement of August date 11th, 1875, between the St. Louis County Railroad and the St. Louis, Kansas City & Northern Railroad, and also the tripartite agreement of the same date between the Commissioners of Forest Park, the St. Louis County Railroad and the St. Louis, Kansas City & Northern Railroad Company?

A. I was present with Mr. Lewis during a great many interviews that were had between Mr. Sharp, more particularly, and Mr. Kasson and Col. Broadhead and others who were interested in the County road, in which the terms of the agreements were outlined and discussed. At one or two of those meetings I met Mr. Sharp at Mr. Sharp's office, and had one or two interviews at the railroad office at which time Col. McKinley was present.

Q. You were the general solicitor?

307 A. At that time I was the general solicitor of the St. Louis, Kansas City & Northern Railway Company. Before the contracts were written out I met with an accident—my leg was broken—and the negotiations were consummated and the agreements were written out and signed while I was confined to my house and I was not present. I did not prepare them.

Q. Pending those negotiations what discussion, if any, took place between yourself and the Forest Park Commissioners, or in your presence, with reference to the contract of October 9th, 1872, made by the St. Louis County Railroad Company with John Withnell, Joseph O'Neil and H. W. Leffingwell?

A. I cannot say that there was anything said about that contract except merely that there was or had been such an instrument. I don't recollect that it was considered as cutting

any important figure. I simply recollect that in talking about the situation it was mentioned, and that is all I can recollect. I had forgotten it until the other day when it was mentioned here.

Q. Do you remember that among the terms of that contract that was discussed was this, that the County railroad under that contract was to pay the Forest Park Commissioners one and a half cents per round trip for its passengers over the road from the Union Depot to the park?

Defendants' counsel objects to the question as incompetent; objection overruled, defendants except.

A. I don't recollect that any specific provision of the contract mentioned was referred to or discussed.

Q. The property between Eighteenth street and Twenty-first street where the Anchor mill is located, formerly
308 owned by the St. Louis County road, lying north of the 30 foot strip acquired by the Kansas City & Northern Railway Company from the St. Louis County road in 1875, does the Wabash road now own that property or is it in the possession of the Bridge Company?

A. The property owned by the St. Louis County Railroad Company, prior to August 11th, 1875, and not conveyed on that date by the County road to the St. Louis, Kansas City & Northern, was afterward mortgaged by the County road and by means of conveyances the title was acquired by the St. Louis, Kansas City & Northern. Those conveyances are shown by the certificate of the Sterling & Webster Abstract Company, in evidence.

Q. My question was whether they had not sold that piece between Eighteenth and Twenty-first street to the Bridge Company, that portion lying just south of the Anchor mills, between the Anchor mills and the original 30 foot strip acquired by the St. Louis, Kansas City and Northern from the St. Louis County road?

A. My recollection is that there was one piece of ground between Eighteenth and Twenty-first streets that was purchased from Haussler by Mr. Grover for the Bridge Company, or for the Union Depot Company, I cannot tell which, and that was conveyed from Grover to the Union Depot Company or the Bridge Company. The balance of the real estate of the County Railroad Company was conveyed by Grover to the Kansas City & Northern Railway Company.

W. S. Lincoln, sworn for defendants, testifies as follows:

309 Direct Examination

By Mr. Priest:

Q. You are chief engineer for the Receivers of the Wabash, St. Louis & Pacific Railway Company? A. Yes sir, I am.

Q. Prior to the time the Receivers took possession, what position did you occupy with reference to that road?

A. I had the same position with reference to the Wabash, St. Louis & Pacific Railway Company.

Q. Are you familiar with the road-bed of the Wabash, St. Louis & Pacific Railway Company through Forest Park?

A. Yes sir, I am to some extent.

Q. I will get you to state the greatest width of the roadway through Forest Park, excluding the toe of the embankments and the slope of the cuts?

A. The greatest width occupied now where they are is 38 feet.

Cross Examination

By Mr. Orrick:

Q. Please state to the Court whether that is a sufficient width for two tracks?

A. Yes, sir; that is sufficient for two tracks at that point.

By Mr. Priest:

Q. Do you know what the average width of the grade is? You have stated the greatest width, what do you know is the average width?

The Master: Is that confined to the park, Mr. Priest?

Mr. Priest: Yes, sir.

The Witness: I don't know that I can state what the average width is.

By Mr. Orrick:

Q. I will ask you one question more, what is the width from the park in, the right of way from the park to Eighteenth street?

A. I don't know that I can state that; it is irregular widths at different places.

310 Q. You don't know what the width of the right of way is from the park in?

A. No, sir; I could not state.

By the Master:

Q. What is the width of the construction of the road as it at present exists, from the park in to Eighteenth street?

A. That varies of course with the height of the embankment or the depth of the cut.

Q. Is there room on the road as constructed for a second track? A. At some points there is but not generally.

By Mr. Priest:

Q. How long have you been acquainted with this roadbed through Forest Park? A. About five years.

Q. Has there been any change in it since you first knew it as to its width?

A. Substantially it has been the same width ever since I first knew it.

This was all the testimony introduced by defendants.

Counsel for intervenor, in rebuttal, offers in evidence the act of March 25th, 1872, establishing Forest Park.

Defendants' counsel objects to same, because the act itself is void as being in conflict with the constitution and states that the Supreme Court of this State has so held.

The Master overrules the objection on the ground that it is competent to show the Constitution of the de facto Board of Park Commissioners which subsequently conveyed the right of way 70 feet through the park, which right was recognized by the legislature in the passage of its act constituting the second Board of Park Commissioners.

Defendants' counsel excepts to the ruling of the Master.

311 Counsel for the Intervenor in evidence the contract between the Commissioners of Forest Park and the St. Louis Railroad Company, dated October 9th, 1872.

Defendants' counsel objects to same as irrelevant, incompetent and inadmissible for any purpose, and also because the act under which Commissioners making the contract were acting is void.

The Master (to Mr. Priest): Does your objection go to the extent of denying that the contract was actually executed by the Board constituted under that first act and the President of the St. Louis County Railroad at that time, or do you admit it was executed?

Mr. Priest: I admit the physical execution by the parties whose names appear as Commissioners.

The Master: And that they were the parties named as the Board under the act which you say was declared void?

Mr. Priest: I presume that is true. I admit they were pretending to act as the Commissioners named in the act of 1872.

The Master: With this admission I will overrule the objection.

Defendants' counsel excepts to the ruling of the Master.

The contract offered was marked Exhibit H.

This was all the testimony introduced in the case.

After the close of the case, by agreement of counsel, it was reopened and it was stipulated that the plat marked Exhibit X, indicating the location of rights of way of St. Louis County Railroad through Forest Park, shall be received as evidence of the locations of the several rights of way as located thereon, and also of the location of Griswold's land, Duncan's
312 Subdivision, and that part of the Park through which the said railroad ran.

I certify that the foregoing testimony and record of testimony and proceedings before me as Master herein are correct.

GEO. H. SHIELDS, Master.

September 30, 1886.

313 In the Circuit Court of the United States, for the Eastern District of Missouri.

The City of St. Louis, St. Louis, Kansas City & Colorado R. R. Co., Intervenors in Central Trust Company of N. Y., et al., Complainants,
Nos. 2357 and 2464. vs.
Wabash, St. Louis and Pacific R. R. Company et al., Defendants.

Consolidated Causes.

To the Honorable, the Circuit Court of the United States for the Eastern District of Missouri:

This case having been re-referred to the Master on the 30th day of July, 1886, by order of his Honor Judge Brewer in Chambers, on the 4th day of August, 1886, the intervenors filed an amended bill; and on the 21st day of August, 1886, the Wabash, St. Louis and Pacific Railway Company, the Central Trust Company of New York, James Cheney, Trustee, and Solon Humphreys and Thomas E. Tutt, Receivers, being all the defendants, filed their joint answer to said bill. Owing to the absence of the Master in the East at the time the second reference was made, the case was not set for hearing until the 30th day of August, 1886; due notice having been given
314 to all parties. On that day the Master was ready to proceed, but, owing to an agreement between the parties, the case was continued until the 7th day of September. Afterwards, by consent of parties, the continuance was set aside, and by consent the case was set for hearing on the 2nd day of September, 1886; the case was heard from time to time as counsel agreed, until the 6th day of September, and was set down for final argument on September 11th. The argument being had, leave was given to the parties to file briefs on or before September 14th, at which time briefs were filed by counsel for both

sides and the case submitted. The particulars of all which will appear in the transcript of testimony herewith returned.

The amended petition is substantially the same as the original petition, some of the averments being made more specific, and the additional averment that "on the 24th day of December, 1878, the St. Louis, Kansas City and Northern Railroad became the owner by deed of all the remaining rights, franchises, property and right of way through said park and to said Eighteenth street, subject to said agreement." The amended petition also avers the acquirement by the railroad companies through the Commissioners of Forest Park, of a right of way forty-two feet wide in and upon and through said park in common with and to be held and enjoyed jointly with said St. Louis County Railroad Company and its assigns, on the terms of said contract between them, and which right of way was that the right of way then and there established by said tripartite agreement as the sole and final right of way for said companies through said park. By the answer and stipulations many of the averments
315 of the petition are admitted, but the construction of the contracts and deed contended for by the intervenors is denied, and the answer then sets up affirmatively that prior to the passage of any law establishing Forest Park, on the first day of November, 1871, the St. Louis County Railroad Company, being then a corporation, acquired from one W. D. Griswold a right of way forty feet wide through a tract of land then owned by him which afterwards became a part of Forest Park; that in an Act of March 25th, 1874, establishing Forest Park, there was a proviso that "nothing in said act should prevent the St. Louis County Railroad from using and occupying a right of way of the width of not more than seventy feet through the northeast portion of said Forest Park," etc., setting forth the proviso in the third section of said Act. The answer then sets out the contract between the St. Louis, Kansas City and Northern Railroad Company and the St. Louis County Railroad Company and the tripartite contract between the same parties and the Board of Forest Park Commissioners, and denies that those contracts bear the construction contended for by the intervenors, particularly denied that the ninth section of the tripartite agreement is binding on the Wabash Railroad, and avers that it is the personal covenant of the St. Louis County Railroad Company, and only related to such right of way as was retained by the St. Louis County Railroad Company; that it was not attached to any grant made by said County Railroad Company; that it did not bind the grantees, or assignees of said County Railroad Company, or any real estate or right of way conveyed by it to the St. Louis, Kansas City and Northern Railroad Company.

316 The answer also denies that the Wabash holds or enjoys all or any portion of the right of way between Union avenue and the Union Depot under any agreement with any person or party requiring them to permit other railroads or railroad companies to use the same, and avers that it now holds the right of way through the park by and through grants from one W. D. Griswold and the State of Missouri to said St. Louis County Railroad Company, free and unincumbered with any condition, easement or license from any source, and deny that except as in said answer stated it holds said right of way or any part thereof under the agreements and deeds of August 11th, 1875.

The answer also denies that there was any consideration for the tripartite contract, because the Park Commissioners had no power to grant or give said Railroad Company anything for a consideration for such covenant, and denies that the tripartite contract was duly recorded. The answer puts the defendants' construction upon the contracts; admits the consolidation of the St. Louis, Kansas City and Northern Railway Company with the Wabash Railway Company, and that by virtue of the statute in such cases made and provided, "it became seized and possessed of the railroad, real estate, etc., previously owned by the St. Louis, Kansas City and Northern Railroad Company." The answer further sets up that afterwards, on the 1st day of June, 1880, the Wabash Railroad issued its negotiable bonds and conveyed all of its railroads, real estate and rights of way, including the right of way in controversy, to the Central Trust Company and James Cheney, Trustees, to secure said bonds; that through a default on the bonds, there was an appoint-
317 ment of receivers, and that the receivers are now in possession of said property under said mortgage; that neither the bondholders, trustees, nor the receivers are privy to or bound by any agreement made by the St. Louis County Railroad Company and said Park Commissioners in respect to this right of way through said park or elsewhere by other railroads.

That there was no privity of contract or privity of estate between the petitioners and the defendants to the right of way in controversy. That the ninth section of the tripartite agreement was not binding on the defendants because it provided for the use of the right of way on such terms "as may be agreed upon between it and other railroads desiring the use thereof," and that it would be inequitable to substitute the judgment of the court for the judgment of the parties, and because there never was any mutuality of obligation between the St. Louis County railroad and other railroads desiring to use said right of way.

A general replication to this was filed denying the facts set up in answer, on which pleadings, exhibits and evidence the case was submitted.

As the functions of the Master in this case are practically advisory in their nature, it will perhaps aid the court to give a brief history of the connection of the parties with this right of way in controversy as shown by the evidence.

In 1871 W. D. Griswold owned property known as the Cabanne Dairy Farm, between Kings Highway and Union Avenue, part of which land south of Lindell Avenue extended, afterwards became part of Forest Park. On the 21st day of November, 1871, by an instrument of writing under seal, which was proved by the attesting witnesses and filed and re-
318 corded in the Recorder's office of St. Louis County, December 5th, 1871. Said Griswold consented that the St. Louis County Railroad might "locate, construct and maintain its railroad across and over said land," "on a right of way forty feet in width, the center line of which begins on Kings Highway, twenty feet north of the southeast corner of said land conveyed, (i. e. the land conveyed by him) and running along parallel to the south line thereof Eight Hundred and Twenty-five (825) feet, and thence by a curve Eleven Hundred and Seventy (1170) feet long, bearing northwest with a radius Nineteen Hundred and Three (1903) feet, thence by a line bearing north fifty-five (55) degrees west, about Ten Hundred and Ninety (1090) feet to a point on Union Avenue, not less than Four Hundred and Eighty-seven (487) feet south of the northeast corner of Robert Forsyth's land," (for the location of this line see Exhibit "X") "and the right of way hereby granted to said Railway Company shall be forty (40) feet in width through said land, for the location, construction and maintenance of its railroad and for that use and purpose only. This license to operate in perpetuity if the St. Louis County Railway Company, its successors and assigns, shall continue to operate and maintain their railroad, and to cease with their non-use of the same for such purposes. The said instrument further declares that the license was granted subject to the condition, "that the road should be built, maintained and operated and that they should make good fences on each side of the railroad," etc. It also gave consent that the toe of the embankment might run over on the adjoining land and that the slope of the cut might also extend over his land as might be necessary or convenient."

319 On the 25th day of March, 1872, the General Assembly of the State of Missouri, passed an act, entitled "An Act to establish Forest Park" (Session Acts, Mo., 1872, p. 255),

which park included part of this land of Griswold's. Section five of said act put said park under the exclusive control and government of a Board of Commissioners, and conferred upon said board very general authority to do what was necessary to carry out the true manner and intent of the act.

On the 29th day of October, 1872, an agreement was entered into between the Forest Park Commissioners and the St. Louis County Railroad Company, by which the Forest Park Commissioners "granted and agreed to convey or cause to be conveyed to the said railroad company, a free right of way, seventy (70) feet wide, through said Forest Park, according to the blue line on a map accompanying this agreement, being the same designated and agreed upon by John Whitnell, Joseph O'Neill and W. W. Leffingwell, on behalf of said commissioners, and W. Marsh Kosson on behalf of said railroad company.

In consideration of $1.00 and the covenants in said agreement, to be performed by the parties of the first part, "the railroad company hereby relinquish and shall cause to be conveyed to said Park Commissioners that portion of the right of way heretofore obtained by them from W. D. Griswold, within the limits [the of] said Park." (See Exhibit "X.") The agreement then provided for the manner in which the railroad company shall construct its railroad, which it agreed to complete on or before the first day of January, 1874, and to extend their track to Eighteenth Street, in St. Louis, within two years. The Park Commissioners agreed to grant for
Depot purpose a place 700 feet in length by 100, in-
320 cluding the seventy foot right of way. The railroad company agreed to pay to the Park Commissioners, one cent on every fare collected on visitors to and from St. Louis and said park depot, and one and one-half cents on every round trip ticket between the same points. The Park Commissioners out of this sum agreed to pay the railway company, twenty-five thousand dollars ($25,000.00), as a consideration for the tunneling and extra grading required by the agreement, and also agreed to exact the same toll from other railroads and conveyances carrying passengers for hire, from St. Louis to the park. The Park Commissioners retained the right to change at their expense, the grade and right of way of said railroad at any time, through the park, on certain conditions, and the railroad company agreed to make regulations as to running of the cars, etc., as might be necessary for the safety of the passengers, and agreed to enjoy the privileges granted them in such manner as not to mar, injure or destroy the purpose for which said park was established. The railroad company was given full power as to running trains etc., and the

Park Commissioners reserved general jurisdiction for police and park purposes over the same, as over other portions of the park. This agreement was acknowledged on the 5th day of December, 1872, by the president and secretary of the Park Commissioners, and the president and secretary of the St. Louis County Railroad Company, and was produced by the present Park Commissioner of the city of St. Louis as being turned over to him by the Park Commissioners with other papers, records etc., when the Board was abolished, by
321 the adoption of what is known as the "Scheme and Charter," in 1876.

The agreement was recorded December 5th, 1872. The St. Louis, Kansas City and Northern Railroad Company had actual notice of the same, as will be seen by the testimony of Col. Blodgett, on cross-examination by Mr. Orrick, (p. 33), he saying, that "during the negotiations which led up to the agreements of August 11th, 1875, between the St. Louis County Railroad and the St. Louis, Kansas City and Northern Railroad, and also the tripartite agreement between the same parties and the Commissioners of Forest Park," (in which negotiations he represented the St. Louis, Kansas City and Northern Railroad Company), "that this contract" (of October 29th, 1872) "was mentioned." Col. Blodgett said, (p. 33), "I cannot say that there was anything said about that contract, except merely that there was or had been such an instrument; I don't recollect that it was considered as cutting any important figure; I merely recollect that in talking about the situation it was mentioned, and that is all I recollect. I had forgotten it until the other day when it was mentioned here."

At the October term of the Supreme Court of the State of Missouri, this first act establishing Forest Park was held unconstitutional and void, for the reasons, that it was not established for municipal purposes within the meaning of Sec. 4, Art. 3, of the State Constitution, and that it authorized a special tax for the purpose of a general public character. (See State ex rel. Chouteau vs. Leffingwell, 54 Mo. 453.)

On account of this Act being declared void, the counsel for the defendants insisted that neither it nor the agree-
322 ment just referred to was competent evidence. I overruled the objection and admitted the act of 1872 and also the contract, as relating to transactions between the St. Louis County Railroad Company, and the de facto Board of Park Commissioners, and as explaining the proviso in the second Act establishing Forest Park pleaded by both sides.

The plat in evidence (Exhibit "X") shows the extent of the differences there were between the right of way as conveyed

by the Griswold deed, and the right of way as established by the contract of October 29th, 1872, between the Commissioners of Forest Park and the St. Louis County Railroad. It is very evident, from an inspection of the plat attached to and a part of this latter agreement, and of plat marked Exhibit "X," that the right of way of seventy feet conveyed to the St. Louis County Railroad in lieu of the Griswold right of way relinquished by said railroad company, was not the same line as that described in the Griswold deed. The Griswold line beginning at King's Highway "is a straight line for eight hundred and twenty-five (825) feet, thence by a curved line eleven hundred and seventy (1170) feet long, bearing northeast with a radius of nineteen hundred and three (1903) feet, and thence by a line bearing north fifty-five (55) degrees west, about ten hundred and ninety (1090) feet to a point on Union avenue," etc. Whereas the line as shown by the plat attached to the agreement of the 29th day of October, 1872, and the plat marked Exhibit "X" is an entirely different line, entering the park through Duncan's subdivision and much further south than the Griswold line, and running through the park on a series of curves and entering Griswold's land several hundred
323 feet west of Kings Highway, (See the lines as indicated on plat marked Exhibit "X.")

On the 25th day of March, 1874, the General Assembly of the state of Missouri passed a second act establishing Forest Park. (See Session Acts Mo., 1874, p. 371.) This act omitted the objectionable features of the act of 1872, and provided that the property within the park limits should be condemned, and also that when the same should be paid for, that the title should vest in the people of the county. In Section Third, which provided for the vesting of the property in the people of the county, by general condemnation proceedings, is inserted this proviso: "provided that nothing in this act shall prevent the St. Louis County Railroad from using and occupying a right of way of the width of not more than seventy feet through the northeastern portion of said Forest Park; the said railroad shall only enter the park through Duncan's subdivision on the east side of said park, and running westwardly on the northern side of the River Des Peres; shall pass out of said park at a point on the northern line thereof, east of Union avenue; and provided further, that no switch or siding shall be constructed by said railroad company in said park, nor shall more than one depot be established in said park, and that shall be for passengers only; and provided further, that the grade of said railroad as far as the same runs through Forest Park, shall be approved by said Forest Park Commissioners." This

is clearly legislative recognition of the agreement between the old Board of Forest Park Commissioners and the St. Louis County Railroad, made the 29th day of October, 1872. The right of way obtained by said railroad from the old Board of Park Commissioners was seventy feet in width; it en-
324 tered the park through Duncan's sub-division on the east side of the park; it ran westwardly, on the northern side of the River Des Peres, and passed out of the park at a point on the northern line of Union avenue east of Union avenue, as will be seen by an examination of the plat attached to and a part of said agreement and plat marked Exhibit "X." It cannot be a legislative recognition of the Griswold line, because that line is not seventy but forty feet wide; it did not enter the park through Duncan's sub-division, but at King's Highway, twenty feet north of the southeast corner of the Cabanne, dairy farm, much farther north than Duncan's subdivision. The proviso in the act did not establish a definite right of way of seventy feet on the exact line, as granted by the old Board of Forest Park Commissioners, but it recognized an acquired right of way in the St. Louis County Railroad Company, and excepted that from any construction of the act which might endanger it; and in describing the land substantially followed the line as granted by the old Board of Forest Park Commissioners, not the line as granted by Griswold.

This was the state of the case in regard to the right of way through the park, on the 11th day of August, 1875, when the agreement between the St. Louis County Railroad and the St. Louis, Kansas City and Northern Railroad Company and the tripartite agreement between the same parties and the Board of Forest Park Commissioners, and the deed from the St. Louis County Railroad Company to the St. Louis, Kansas City and Northern Railroad Company were made.

In the agreement of August 11th, 1875, between the St. Louis County Railroad Company and the St. Louis,
325 Kansas City and Northern Railroad Company and the Commissioners of Forest Park, the Forest Park Commissioners "in consideration of the relinquishments, agreements and stipulations hereinafter contained, on the part of said party of the second part, do hereby accept and approve the line and grade of said railroad, as laid down and described upon the accompanying plat and profile hereto attached, and forming a part of this agreement, and said line and grade in case there is not forfeiture of this agreement, is hereby fixed as the sole and final established right of way to which said party of the second part is entitled by statute or otherwise through said park or any part thereof, and the width of said right

of way as established by statute is hereby reduced from seventy feet and fixed at forty-two feet between its outer points, etc. In the second paragraph of this agreement the St. Louis County Railroad in consideration of foregoing agreements on the part of the Park Commissioners "does hereby relinquish twenty-eight feet off the seventy feet established by statute for its right of way through Forest Park, except in case of forfeiture of this agreement, and provided that in case the right of way herein described and established shall not be promptly placed at the disposal and to the use of said railroad, party of the second part or its assigns, or in case of any unreasonable delay or hindrance on the part of said Park Commissioners in regard to placing said party of the second part, or its assigns, in possession of said right of way, under the terms and conditions of this agreement, then in such cases," etc., the agreement should be forfeited, and the parties should be restored to all their rights, as if it had never been made.

326 It must be observed that the Park Commissioners in consideration of this relinquishment and the agreements and stipulations in the contract, accept and approve the line of the railroad, and that the width of said right of way was fixed at forty-two feet between its outer points, which is a different width from that acquired originally from Griswold, (which was forty feet), and a different width also from that conceded to the St. Louis County Railroad by the first Board of Forest Park Commissioners, and recognized by the proviso to Section Three in the second Forest Park Act, (which was 70 feet). It must be further observed that the tripartite agreement expressly refers to this seventy feet right of way as "being established by statute." It can hardly be asserted that the legislature by the proviso to the third Section of the Forest Park Act of 1874 granted a right of way of seventy feet through the park. It certainly recognized such right of way, but the source of the right of way of seventy feet was the contract between the old Board of Park Commissioners and the St. Louis County Railroad, of October 29, 1872. The St. Louis County Railroad was asserting its right to seventy feet, not to forty feet; it relinquished twenty-eight feet by the tripartite agreement, not from forty feet, but from seventy feet, and could only have referred to that right obtained from the old Board of Park Commissioners, and not to that obtained from Griswold. Evidently its contention was that the recognition of a right of way of seventy feet by the Legislature was a validation of the action of the old Board, although the act under which the Board assumed to act was void; and it carefully preserved its rights, if from any cause the tripartite agreement should fail to be car-

ried into effect. By the tripartite agreement the rail-
327 road companies obtained a grant from the Forest Park Commissioners of a new line forty-two feet wide, and differing from both of the Griswold line and the line as established by the old Board (see plat marked exhibit "X"), and an approval of the line and grade of the road and other valuable concessions. The St. Louis, Kansas City & Northern Railroad was a party to this contract for itself, and took its rights under it, and afterwards acquired the rights of the St. Louis County Railroad by forfeiture under this agreement and the agreement of August 11th, 1875, between the two companies.

It is evident to my mind that those contracts between the two railroads, and between the two railroads and the Board of Forest Park Commissioners, was the final adjustment of disputed questions between the parties so far as the right of way through the Park was concerned. In the contract between the two roads this provision appears: "Whereas, it is desirable and intended to have an amicable adjustment of all differences and conflicting claims and rights;" and the twelfth section of the tripartite agreement provides: "And whereas, for the purpose of enabling the party of the third part to reach the Union Depot, at St. Louis, Missouri, an amicable arrangement and agreement for the right of way outside of and through said Forest Park has been made and entered into by and between the parties of the second and third parts"—"and whereas,the party of the third part, in further pursuance of said last-named agreement, is about to construct and maintain a railroad in, upon and through said Park"—"now, therefore, in view of the premises, and as [as] inducement to said party of the third part to proceed as intended, the party of the first part, the
328 Board of Park Commissioners, does hereby grant and convey unto, and license and permit the said party of the third part (the St. Louis, Kansas City & Northern Railroad), its successors and assigns, to have, hold, use and enjoy said right of way, in, upon and through said Park in common with, and to be held and enjoyed jointly with, said party of the second part and its assigns," etc. It is evident to my mind that the St. Louis, Kansas City and Northern Railroad Company and the St. Louis County Railroad Company and the Board of Forest Park Commissioners, all regarded the tripartite agreement as being a grant, and the establishment for the first time of a definite right of way through the park by the legal Board of Forest Park Commissioners, and that such agreement was necessary in order that the roads should enjoy the same. This view is strengthened by the terms of the deed of August 11th, 1875, to the St. Louis, Kansas City and Northern Railroad from the St. Louis County Railroad. It refers to the

Griswold deed when conveying the right of way north of the park, but when conveying the right of way through the park it says: "an undivided one-half of all the right, title and interest of the party of the first part of, in and to the right of way, and of, in and to any and all other rights, privileges and franchises, powers and immunities owned by or vested in or enjoyed by, or that may be hereafter acquired or owned by, vested in or enjoyed by the party of the first part in, through or upon Forest Park, by any means or from any source whatever;" not simply those rights acquired by the Griswold deed, but those acquired by any means and from all sources.

I have carefully reconsidered, in the light of the ad-
329 ditional averments and additional testimony, the construction given by me in my first report herein as to the legal effect of these contracts and deeds, and I am confirmed in my opinion as then expressed, and I respectfully refer to the same as part of this report, without restating the same.

The answer of the defendants admits that the St. Louis County Railroad Company failed to live up to its agreement and the tripartite agreement, that the said St. Louis, Kansas City and Northern Railroad Company, in accordance with the terms of the aforesaid agreement, "entered upon the sole and absolute possession and enjoyment of all said rights, privileges, franchises, powers, immunities, improvements and property, to the exclusion of the said St. Louis County Railroad, its successors and assigns," and that afterwards the Wabash Railway Company, by virtue of its consolidation with the St. Louis, Kansas City and Northern Railroad Company, became seized and possessed of all the aforesaid real estate, railroads and property previously owned or possessed by said St. Louis, Kansas City and Northern Railroad Company.

There can be little doubt that if the St. Louis County Railroad had built its railroad on the portion of the right of way retained by it, that it would have been bound by its covenants in the Ninth Section of the tripartite agreement. By the Twelfth Article of that agreement the St. Louis, Kansas City and Northern Railroad especially covenanted as follows: "Or in case said party of the second part (the St. Louis County Railroad), its successors or assigns, should forfeit its said rights,
privileges and franchises in, upon and through said
330 Park, or from any cause cease to have, maintain or enjoy the same, then it is hereby agreed and covenanted that the party of the third part (the St. Louis, Kansas City and Northern Railroad), shall not also be excluded from said Park, but shall, with its successors and assigns, continue to have,

maintain and enjoy all its said rights, privileges, immunities, franchises, improvement and property on the terms hereinbefore set forth, continuously and forever." Thus expressly covenanting that it should enjoy the privileges, etc., under the limitations without exception, set out in the contract.

Even in the absence of such a stipulation I am of the opinion that when the St. Louis, Kansas City & Northern Railroad Company, as averred in the answer of the defendants, "in accordance with the terms of the agreement aforesaid, entered upon the sole and absolute possession and enjoyment of all said rights, privileges, franchises, powers, immunities, improvements and property to the exclusion of the St. Louis County Railroad, its successors and assigns," by reason of forfeiture, that it could only take such privileges, immunities, etc., subject to the conditions under which they were held by the St. Louis County Railroad.

I respectfully refer the court to my original report herein, supporting this view.

The amended bill avers that on the 24th day of December 1873, the St. Louis, Kansas City and Northern Railroad purchased and became owner by deeds of all the remaining rights, franchises, property and right of way formerly held or owned by the St. Louis County Railroad through said park, and to said Eighteenth street, subject to said agreements. This is
331 practically denied by the answer, although the denial perhaps goes no further than to deny that the conveyance was subject to said agreement.

The evidence shows that on the first day of October, 1875, the St. Louis County Railroad Company made its deed of trust to Rufus J. Lackland and Gerard B. Allen, as trustees, to secure three hundred thousand dollars ($300,000.00) of bonds due in thirty years with interest at seven per cent, whereby it mortgaged all its property and franchises, not before conveyed to the St. Louis, Kansas City and Northern Railroad. This deed was recorded October 9th, 1875. On the 8th day of June, 1877, the said trustees sold the road under the deed of trust and conveyed it to Charles Miller. This deed was recorded June 8th, 1877. And by mesne conveyances the said property was conveyed on the 4th day of December, 1878, to the St. Louis, Kansas City and Northern Railroad Company. This deed was recorded on the 27th day of December, 1878. On the 5th day of December, 1878, the Sheriff of St. Louis County sold under execution on two judgments rendered on the 15th day of October, 1877, against the St. Louis County Railroad Company, certain portions of the property of the St. Louis County Railroad, and the same was

afterwards conveyed by mesne conveyances to the St. Louis, Kansas City and Northern Railroad Company, so that before the consolidation of the Wabash, practically all of the property and franchises of the St. Louis County Railroad had passed to the St. Louis, Kansas City and Northern Railroad Company, and when the Wabash Railroad succeeded to the rights, etc., of the St. Louis, Kansas City and Northern Railroad by virtue of the consolidation, it claimed title to all the property of
332 the St. Louis County Railroad, first by virtue of the deed from the St. Louis County Railroad Company, and the two agreements of August 11th, 1875, and second by forfeiture under the said agreement on account of the failure of the St. Louis County Railroad to pay its proportion of the expense of constructing the road, and third, by and through the subsequent deed of October 1st, 1875, to Lackland and Allen, and the Sheriff's deed under the judgment of October 15, 1877.

Before this bill was filed, on the 1st day of June, 1880, the Wabash Railroad Company made its mortgage to the Central Trust Company and to James Cheney, Trustees, of all this property to secure certain negotiable bonds described in the answer, under which the Receivers herein were appointed by this Honorable Court.

The counsel for the Receivers claim that the mortgagees take as an assignee; that there was no notice to the Trust Company or to Cheney of the tripartite agreement, and that there is no privity of contract or privity of estate between the petitioners and defendants in regard to any of said property.

The tripartite agreement although executed by the respective parties under seal, was never acknowledged. It was filed for record, and recorded September 5th, 1879, before the mortgage of the Wabash was executed to the Central Trust Company and James Cheney, but after the deed of trust by the St. Louis County Railroad Company dated October 1st, 1875, to Lackland and Allen, Trustees. Under the statutes of the State of Missouri, the tripartite agreement was not entitled to record. (Revised Stat. Mo., 1879, Secs. 676, 681, 691).

333 The Supreme Court of the State of Missouri in the case of Bishop vs. Schneider (46 Mo., 472), held that a deed not acknowledged, or improperly acknowledged, although recorded, will not be constructive notice to any one. The counsel for the Receivers therefore claim that the defendants herein occupy the position of purchasers without notice. I do not agree with counsel in this claim. Under the Missouri Registry Laws a conveyance unrecorded is good and passes title as against the grantor, his heirs and devisees, and is void only

against subsequent purchasers and mortgagees, without actual notice, from the same grantors, whose deeds were first recorded.

McCammant vs. Patterson, 39 Mo. 110.
Cockrell vs. Maguire, 10 Mo. 89.

Such deed is good as between the parties or those purchasing with actual notice.

Stevens vs. Hampton, 46 Mo. 404.

Whenever the state of the title on the record would lead a searcher of incumbrances who is using common prudence and care in investigating the title to the knowledge of a fact, the law assumes that he acquires knowledge of it.

Dignan vs. Coleman, 47 Mo. 375.
Levy vs. Wolf, 10 Ohio, 35.

The record of a deed which was so defectively acknowledged as to not impart constructive notice, would yet con-
334 stitute actual notice to any parties who actually saw the record.

Musick vs. Berry, 49 Mo. 458.

Where a purchaser is put on inquiry, he is to be deemed as purchasing with notice.

Stevens vs. Smith, 7 Mo. 610.
Marne vs. McLean, 13 Mo. 298.
Speck vs. Wiggan, 40 Mo. 405.
Mawpins vs. Emmons, 47 Mo. 304.
Mean vs. Blaine, 80 Mo. 184.
Widdecomb vs. Childress, 84 Mo. 383.

Under the circumstances of this case there can be no doubt that the defendants are charged with notice of the tripartite agreement, as they are presumed by law to take notice of whatever was properly on the record. The certainly derived title to part of this property through the Park under the deed of August 11th, 1875, from the St. Louis County Railroad to the St. Louis, Kansas City and Northern Railroad Company. This deed was recorded August 13th, 1875, long before the mortgage to the defendants, and before the mortgage of the St. Louis County Railroad to Lackland and Allen, dated Oct. 1st, 1875. This deed recites "that it was made in pursuance of the terms of a certain contract made and executed by and between the parties of the first part and second part hereto, dated August 11th, A. D. 1875, and in full satisfaction of so much of said contract as relates to the conveyance of certain pieces of land and right of way to said party of the second part."

This deed also recites "all of which conveyances of the said rights of way in this deed mentioned are made subject
335 to the terms and conditions upon which the same are granted to the party of the first part." These recitals certainly put all parties on inquiry. When they examined the contract of August 11th, 1875, between the two railroads, they found a reference to the tripartite agreement as follows: "and whereas this agreement, and a certain agreement between the parties hereto, and the Commissioners of Forest Park of even date herewith, the party of the second part is about to, and hereby in consideration of the covenants and agreements of the party of the first part hereinafter specially set forth, and of the covenants and agreements of said Commissioners of Forest Park in said agreement with them contained, does covenant and agree to construct and maintain a railroad bed and road in, upon and through said Forest Park and the tunnel and cut hereinbefore specified, according to certain plans and specifications agreed upon, and according to the terms and conditions of said agreement with said Commissioners, for the joint use of both the parties of the first part and the second part hereto, their several successors and assigns," etc., etc.

This deed is a necessary link in the chain of title through which the mortgagees claim; it refers as a part of said deed to the agreement between the two railroads, and this agreement refers to and makes a part of it the tripartite agreement of the same date. There can be no question under these facts and Missouri decisions that not only the mortgagees under the mortgage of December 1st, 1880, but the mortgagee under the mortgage of October 1st, 1875, are chargeable with notice of the tripartite contract.

336 I am also of the opinion that the clause "all of which conveyance of the said rights of way in this deed mentioned are made subject to the terms and conditions upon which the same are granted to the party of the first part" would be sufficient to put all parties on inquiry as to the terms of the tripartite contract, under which the St. Louis County Railroad claimed its right of way through the park. The Griswold deed was on record, the contract between the old Board of Forest Park Commissioners and the St. Louis County Railroad was on record. The act of 1874 creating the new Board was a public Act with its provisions as to the seventy feet, right of way through the park, and all this before any of the mortgages or judgments through which the defendants' claim were executed. The defendants must be held chargeable with notice of all the covenants of the tripartite contract.

The counsel for the Receivers contend that the defendants are not bound by the Ninth Article of the tripartite agreement,

as assignees of the original parties, because the covenant is personal and does not run with the land, and cites in support of this, among other cases, Norcross vs. James, American Law Register, 1886, p. 64. The facts are as follows: One Kibby conveyed to Flint a quarry of six acres bounded by other land of Kibby's, covenanting for himself, his heirs, administrators and executors with Flint, his heirs and assigns, that he was seized in fee, etc., "and that I will not open or work or allow any person or persons to open and work any quarry or quarries in my farm or premises in said long meadow." By mesne conveyances plaintiffs bought Flint's quarry and defendants
337 the surrounding land. Defendants opened another quarry on their land, and plaintiffs brought suit by injunction to restrain them. The Court held that the covenant could not be enforced against the assignees of the grantor who made the covenant, putting this decision on the ground that the covenant does not touch and concern and extend to the support of the thing conveyed; citing 5 Coke's Reports, 16. And further, that it was not for the benefit of the estate conveyed; citing Cockson vs. Cock (6ro. Jac. 125). The Court says the scope of the covenant and the circumstances show that it is not directed to the quiet enjoyment of the dominant land. It also intimates that being a covenant for a monopoly, it is invalid; but declined to decide that question. The Court, however, uses this language: "On the other hand, if the rights in question were of the class to which commons belonged, and of which easements are the most conspicuous type, these rights, whether created by prescription, grant or covenant, when once acquired were attached to the land, and went with it irrespective of privity into all hands, even those of a disseizor (page 66).

"When it is said in this class of cases that there must be a privity of estate between the covenantor and covenantee, it only means that the covenant must impose such a burden on the land of the covenantor as to be in substance, or to carry with it a grant of an easement or quasi easement, or must be in aid of such a grant, which is generally true, although, as has been shown, not invariably (Packenham's case), and although not quite reconcilable with all the old cases except by somewhat hypothetical explanation" (p. 67).

The Receivers' counsel also cite Harsha vs. Reid (45
338 N. Y. 415), where the Court decides on the authority of Keppler vs. Bailey (2 Myl. & K. 517), that "a covenant by an owner of land not to permit a grist mill to be erected thereon, is not a covenant running with the land, charging an unnamed assignee. It is a personal contract binding only the covenantors and their personal representatives. It granted no

interest in the premises and created no charge thereon. An action will lie against no one but the covenantor for a breach of this covenant and a subsequent grantee of the lands will not be liable upon it."

He cites also Keppler vs. Bailey (2 Myl. and K. 517). This was a case, where under an act of parliament a canal company was authorized to construct auxiliary railroads, certain land owners and lessees of the Beaufort Works formed a joint stock company to construct a road to the Trevil quarry. In the partnership deed of the railroad company, the lessees of the Beaufort Works covenanted for themselves and heirs, executors, administrators and assigns, with the shareholders, their heirs and assigns, to procure all limestone used in such works, from the Trevil quarry, and to carry all such limestone, and also all the ironstone, from the mines to such works along the Trevil road, and pay a toll of five pence a ton per mile for the same. A bill to enforce this covenant against a person who purchased the Beaufort Works with notice of this partnership was filed, and it was held that the covenant did not run with the land so as to bind assignees at law, and that equity would not enforce it. The court held that the agreement was a fraud on the public, and then proceeds to hold that the covenant does not run with the land. In the case cited, and in the argument in the opinion, the Court recognizes the principle of an
339 easement in adjoining land, being a charge running with the land.

In the case of Tulk vs. Maxhoy, (2 Phil. 774), Lord Cottingham held that a covenant made by the purchaser of land, that he and his assigns would use or abstain from using the land in a particular way, may be enforced in equity against all purchasers with notice of the covenant without reference to the question whether such covenant ran with the land or not.

Smith's Leading Cases, 8th American edition, in notes to Spencer's case, vol. I, p. 167, says: "The doctrine of Tulk vs. Maxhoy has been followed and extended in subsequent cases, and Keppler vs. Bailey must now be considered as overruled, so far as it ignores the effect of taking with notice of a restrictive covenant, citing Luker vs. Dennis, 7 Ch. D. 227, s. c. 47, L. J. Ch. 174.

In the case of Bromson vs. Coffin, (108 Mass. 175), which was distinguished in the case of Norcross vs. James, cited by counsel for the receivers, a covenant to build a fence on a railroad, contained in a deed granting to the road a strip for right of way, was held to be an incumbrance on all the remaining land of the grantee, and ran with the land, on the ground,

among others, that the covenant gave the grantee an interest in the nature of an easement in the adjoining land of the grantee, and ran with the land and constituted [in] incumbrance within the meaning of the covenant against incumbrances in a subsequent deed thereof. The defense was that it was a personal covenant and not binding on the assignees. Gray. Justice, says, on page 180, "an interest in the nature of an easement in the land which the covenant purports to be bind, whether already existing or created by the very
340 deed which contains the covenant, constitutes a sufficient privity of estate to make the burden of a covenant to do certain acts upon the land for the support and protection of that interest, and the beneficial use and enjoyment of the land granted, run with the land charged; and an obligation duly expressed that the structures upon one parcel of the land, shall forever be a certain character for the benefit of an adjoining parcel is equally a charge upon the first parcel, whether the obligation is affirmative or merely restrictive, and whether the affirmative acts necessary to carry the obligation into effect are to be done by the owner of the one, or the owner of the other."

It has been held that even where a covenant does not run with the land, it will still confer an equitable right in the covenantee, which will be enforced against the subsequent purchaser with notice, and which must exist if the instrument containing the covenant is a link in the chain through which he derives title.

Doren vs. Robinson et al., 16 N. J. Eq. 256.
Kirkpatrick vs. Pashine, 24 N. J. Eq. 206;
Atlantic Dock Co. Leavitt, 54 N. Y. 35.

So where the owners of a row of houses covenanted severally with the original owner of the ground not to build in the garden attached to each house. It was held, whether the covenant run with land or not, the purchaser of the houses with notice of the covenant would be bound in equity.

Watson vs. McDermott, 2 L. R. Ch. App. 77.

Even if the doctrine contended for by the Receivers' counsel that the Ninth Article of the tripartite agreement was a personal contract of the St. Louis County Railroad and did
341 not run with the land, were correct, it does not follow that the defendants are not bound by it, as I am of the opinion they had full notice thereof as hereinbefore stated.

I stated in my last report that I did not see the applicability of this doctrine to the case under consideration, for the reason that the St. Louis, Kansas City and Northern Railroad was one

of the original contracting parties to the tripartite agreement, and that the Wabash Railroad did not take merely as a purchaser or an assignee; that by virtue of the statute of consolidation, it took all the property and franchises and assumed all the liabilities, personal or otherwise, of the St. Louis, Kansas City and Northern Railroad, while it may be conceded that the mortgagees take as assignees, I am still of the opinion that the doctrine contended for does not apply, for the reason that one of the considerations for the license and grant for the right of way through the park by the Park Commissioners, was a covenant that other roads should be permitted to use said right of way through the park, and up to the Union Depot. It was in effect saying, "we will give you this right of way through the park, if you will consent that it, and other property either now owned by you or about to be condemned for railroad purposes, shall be subject to the right of user of other roads, we require this for the protection of the park and in the interest of the public.

This proposition was accepted and a covenant made that other roads should use the right of way on terms. The legal effect was to create an easement in the property of the two railroad companies for the benefit of the public and the
342 park and other roads which want to use the right of way, not only through the park, but over the right of way between the park and the Union Depot. Such an easement is a charge upon the land conveyed, and runs with the land, and binds all other land mentioned in the covenant. But whether that be so or not, it is in equity enforceable against all persons who take with notice thereof.

Whitney vs. Union Railway Co., 11 Gray, 359, 364;
Parker vs. Nightingale, 6 Allen, 341, 344.

Counsel for the receivers claim that there is no mutuality in the contract between the St. Louis County Railroad and other railroads desiring to use the right of way, that therefore it cannot be specifically enforced. Among other authorities he cites Waterman on Specific Performance, Sec. 196, which says, "to entitle a party to a specific performance there must not only be a valid and binding agreement, but, as a rule, the contract, at the time it was entered into, must be capable of being enforced by either of the parties against the other." In the same section the author says, "the obligation is mutual, when both the parties are required by the agreement to do something; the promise of one being a consideration for that of the other.

In Sec. 199 the same author says: "if the plaintiff has performed his part of the agreement, specific performance may be decreed, although the contract, so far as concerns performance

by the plaintiff, was beyond the jurisdiction of the court," citing Wilkerson vs. Clements, L. R. 8 Ch. 96.

343 In Sec. 200 the same author says: "it is well settled that an optional agreement to convey or to renew a lease without any covenant to purchase or accept without any mutuality of remedy, will be enforced in equity if it is made upon proper consideration, or forms a part of a lease or other contract between the parties that may be a true consideration for it."

Perkins vs. Hadsell, 50 Ills. 216.

"Where a contract consists of several distinct stipulations on one side, and a legal consideration is stated on the other, it must be considered that the entire contract was in the contemplation of the parties in each particular stipulation, and formed one of the inducements therefor, and no one stipulation can be supposed to result from or compensate for the consideration, or any part of it, exclusive of their stipulations, unless the parties have expressly so declared, and this will be the case whether the consideration be a sum of money to be paid in gross, or a specific act to be performed, or several sums of money or several acts to be performed.

Stansberry vs. Fingree, 11 Gill. & Johnson, 149.
Old Colony R. R. vs. Evans, 6 Gray, 25.

The performance of a contract on one side, entitles the party performing to equitable assistance against the other, though upon application of the latter, the court could not have compelled performance in his favor.

Cooper vs. Penna, 21 California, 403.

Applying these principles to the case under consideration, we find that the Park Commissioners granted a right of
344 way through the park to the two railroads, agreed to and did spend large sums of money making improvements, building bridges, etc., in accordance with said contract, and in all respects complied with their covenants in the contract, and the want of mutuality in the contract originally, if it existed, cannot now be set up to defeat the enforcement of the covenant against the defendants. The defendants confessedly enjoy not only the whole right of way, but all of the benefits of the expenditures of the Board of Forest Park Commissioners and of all the other covenants in the tripartite agreement. It is a contract performed on the part of the Park Commissioners and the city, their legal successor, and the defendants cannot plead want of mutuality successfully, after this performance, and while enjoying all the benefits of such performance. Since

1875, the St. Louis, Kansas City and Northern Railroad and the defendants have enjoyed the rights conferred by the tripartite agreement, not being called upon by the city to permit any other road to use the right of way. When the city appears as an intervenor to enforce the contract for the benefit of another road, in the interest of the preservation of the park, and in the interests of the commercial advantages of the city, she is entitled to demand the fulfillment of the contract.

Objection was also made by the defendants' counsel that the contract was of such character that it cannot be specifically enforced, because it would require a series of orders and general superintendence to enforce the performance.

In the case of Wolverhampton Railroad Co. vs. The London & New York Railway Company, (L. R. 16 Eq. 433), the
345 same point was raised and overruled, and the Court granted the injunction restraining the defendants from carrying a portion of traffic by other lines of defendant which ought to have passed over the plaintiffs' line under the contract.

On the authority of this case and of the Singer Sewing Machine Company vs. Union Buttonhole Company (1 Holmes, 253), and other cases cited in his opinion, Judge Wallace, in the case of the Chicago & Alton Railroad vs. New York, Erie & Western Railroad (22 Am. and Eng. Railway Cases, p. 265), enjoined the diversion of freight from plaintiff's line by the defendant, contrary to contract rights. In this case Judge Wallace quotes approvingly what Judge Lowell said in the Singer Manufacturing case (1 Holmes, 253), i. e., "that it is now firmly established that the Court will often interfere by injunction when it cannot decree specific performance." In a voluminous note to this case the editor of the report says: "The distinction taken in this case between compelling the specific performance of a contract involving a series of acts or continuous acts, and granting an injunction to restrain the commission of a series of illegal acts in violation of the contract, is well taken, and is conclusively established by the authorities."

See Great Northern Ry. vs. Manchester Ry., 5 De Gef and Sm., 138;

Lathrop vs. Junction Ry. Co., 4 Fed. Reporter, 41;
Western Union Tel. Co. vs. Western R. R., 3 Fed. Rep. 423.
Western U. Tel. Co. vs. St. Joe Ry. Co., 3 Fed. Rep. 430.

346 I have examined carefully all the cases cited by the counsel for the defendants on these points, and do not see that they militate against the doctrine herein announced. For further information on these points, I refer to my original report and authorities therein cited.

On the final hearing additional evidence was offered as to the proper measure of compensation and also as to the value of the real estate occupied by the railroad from the north line of Forest Park to Eighteenth street. The testimony as to the value of the real estate does not include the superstructure or terminal facilities occupied by the Wabash, which the testimony of Mr. Talmage shows would be necessarily used if the intervenor had the right to use the Wabash tracks.

After due consideration of this new testimony, I am inclined to think that my original valuation of the track and right of way sought to be used, was equitable and proper under the circumstances.

There has been additional testimony as to the basis of division. Col. Paramore and Mr. Gays giving us their opinion that the equitable basis in the given hypothetical case in the questions put to them, would be the original cost, rather than the present valuation. The witnesses showed no familiarity with cases in which contract rights like the present were involved. I cannot agree with the counsel for the intervenors and with these witnesses that it would be equitable and just to calculate the interest on the original cost of construction and divide it on a wheelage basis. I therefore adhere to my opinion on this point as expressed in my original report.

His Honor, Judge Brewer, in his order recommitting
347 the case, calls attention to a question that is very difficult to determine; that is, whether the right of user by the intervenors extends simply to the right of way not conveyed by the St. Louis County Railroad, or to the whole of the right of way, or whether the right extends to the use of the right of way, and not to the tracks of the Wabash. The evidence of Col. Emerson (p. 15, original testimony) and Mr. Lincoln (p. 17, final testimony), shows that owing to the present construction of the Wabash road and its side tracks and switches, another track on the right of way could not be built throughout the whole distance, although it might be in some parts thereof. The contracts of Aug. 11th, 1875, provide for the joint use of portions of the right of way through the tunnel and cut and also for laying a third rail at designated points, and provides for regulations for such joint use. In view of these facts and in view of the fact that the pleadings show that the whole of this right of way is merged in the Wabash by forfeiture and by subsequent conveyances, and in view of the fact that the Wabash is so constructed that another track could not be placed thereon, it would seem that equity would require the intervenor to be permitted to use the present tracks.

As to the regulations under which the road should be operated, if the right should be granted by the Court, there has been no additional evidence to disturb the recommendation in my first report.

The evidence on final hearing shows that the St. Louis, Kansas City and Colorado Railroad has located its route and commenced condemnation proceedings in the St. Louis Circuit Court to secure its right of way from Forsyth Junction
348 to the point where the Wabash road enters the north side of the park. These proceedings appear to be in good faith, and under the views expressed by Judge Brewer in his opinion herein, entitled that road to an adjudication of its rights in the matter in controversy. Therefore, in view of all the facts and circumstances, I am of the opinion that the intervenors are entitled to relief substantially as prayed for as herein recommended.

All of which is respectfully submitted.

GEO. H. SHIELDS,
Master pro hac vice.

St. Louis, Mo., October 4th, 1886.

After my draft report herein as submitted to counsel, and after defendants counsel had filed exceptions thereto, by agreement they amended the pleadings and submitted as additional evidence plat marked Exhibit "X." This necessitated a recasting of portions of the report which caused the delay in presenting the same. I have carefully considered the exceptions filed by defendants' counsel and hereby overrule said exceptions, and have signed the above report.

All of which is respectfully submitted.

GEO. H. SHIELDS,
Master pro hac vice.

A true copy.

Geo. H. Shields, Master pro hac vice.

349 In the Circuit Court of the United States, for the Eastern District of Missouri.

Central Trust Company of New York et al.,
Nos. 2357 and 2464. vs. In Equity.
Wabash, St. Louis and Pacific Railway Company et al.,

Consolidated Cause.

In re intervening petition of the St. Louis, Kansas City & Colorado Railroad Company, for leave to use the right of way and property of the Wabash, St. Louis & Pacific Railway Company, from north line of Forest Park to the Union Depot.

Now comes the Wabash, St. Louis & Pacific Railway Company; Solon Humphreys and Thomas E. Tutt, receivers of the property and effects of the Wabash, St. Louis & Pacific
350 Railway Company; the Central Trust Company of New York and James Cheney, trustees, and excepting to the first and second reports filed herein by the Hon. George H. Shields, Master pro hac vice, for grounds of exception state:

I.

1st. The Master erred in finding that upon the contract of August 11th, 1875, between the St. Louis County Railroad Company and the St. Louis, Kansas City and Northern Railway Company; the contract of same date between the Commissioners of Forest Park, the St. Louis County Railroad Company and the St. Louis, Kansas City & Northern Railway Company, and the deed of same date, executed by the St. Louis County Railroad Company to the St. Louis, Kansas City & Northern Railway Company, or any of said instruments, "intervenor (the St. Louis, Kansas City & Colorado Railway Company) is entitled to use the right of way of defendants from the north line of Forest Park to Eighteenth street in the city of St. Louis, under such reasonable regulations and terms as may be agreed upon, and upon such terms and for such fair and equitable compensation to be paid to them therefor as may be agreed upon between said parties," or on any terms or conditions whatever.

2d. The Master erred in finding that the covenant of the St. Louis County Railroad Company, contained in the ninth article of the tripartite agreement of August 11th, 1875, was referred to or contemplated by the parties to the deed of August 11th, 1875, from the St. Louis County Railroad Company to the St. Louis, Kansas City & Northern Railway Company,
351 and that it was the intention of the parties to said deed that there should be but one right of way for railroads through said park, which should be subject to common use, not only of said two railroad companies, but such other railroads as might afterwards desire to pass through the park; and that to prevent other railroads from attempting to pass through the park, and destroy it for the purposes for which it was established, the Board of Park Commissioners required, and that the said St. Louis, Kansas City & Northern Railway Company assented to the condition that it would take its said right of way through the park subject to the right of user by other railroads, not only of its right of way through the park, but up to the terminus of its road in the city of St. Louis.

3d. The Master erred in his construction of the said "tripartite agreement," and especially in holding that by reason of

anything contained in the 12th article or clause thereof, the defendants herein, or any of them, became bound by the covenant of said County Railroad, as contained in the ninth article of said "tripartite agreement."

4th. The Master erred in finding that by the terms of said tripartite agreement, the St. Louis, Kansas City and Northern Railway Company covenanted that in case of forfeiture by the St. Louis County Railroad Company, it (the St. Louis, Kansas City and Northern Railway Company) would observe and perform all the conditions and terms imposed by said tripartite agreement, upon said St. Louis County Railroad Company; and in holding, as a matter of law, that under said tripartite agreement said St. Louis, Kansas City and Northern Railway Company could only succeed to the rights, privileges, etc., of said St. Louis County Railroad Company, subject to all the
352 terms and conditions imposed upon said County Railroad Company under said agreement.

5th. The Master erred in finding that upon all the evidence adduced, the St. Louis, Kansas City and Colorado Railroad Company is entitled to use the right of way of defendants from the north line of Forest Park to Eighteenth street, in the city of St. Louis, under such reasonable regulations and terms as may be agreed upon, and upon such terms and for such fair and equitable compensation to be paid therefor, as said parties may agree upon, or on any other terms or conditions.

II.

1st. The Master erred in holding that the covenant of the St. Louis County Railroad Company, contained in the ninth clause or section of said tripartite agreement, was binding upon the grantees, successors or assigns, of said St. Louis County Railroad Company; whereas the evidence shows that said covenant was made only by and for said St. Louis County Railroad Company, and that it was not made for or intended to bind the grantees, successors or assigns of said company.

2d. The Master erred in finding that the covenant or condition of the St. Louis County Railroad Company, contained in the ninth article of the tripartite agreement, was in effect the creation of an easement for the public and other railroads that might want to use the right of way through the park and into the Union Depot, and is enforceable against all the defendants herein.

3d. The Master erred in holding that the Park Commissioners conveyed any right of way to the St. Louis County Rail-

road Company, and that the ninth clause or article of the
353 "tripartite agreement" created an easement for the benefit of the public and other roads that might want to use the right of way through the park and into the Union Depot, and that said easement is a charge upon said right of way, and runs with the land, and binds all other lands mentioned in said covenant.

4. The Master erred in holding that the covenant of the St. Louis County Railroad Company with the Commissioners of Forest Park, contained in the ninth clause or section of said tripartite agreement, to the effect that it would "permit, under such reasonable regulations and terms as might be agreed upon, other railroads to use its right of way through the park and up to the terminus of its road in the city of St. Louis, upon such terms and for such fair and equitable compensation to be paid to it therefor as might be agreed upon by said companies," was more than a personal contract or covenant of said St. Louis County Railroad Company.

5th. The Master erred in finding, as a matter of law, that the recital in the deed of August 11th, 1875, from the St. Louis County Railroad Company to the St. Louis, Kansas City & Northern Railway Company, "that said conveyance was made in pursuance of the terms of a certain contract, made between the parties to said deed, dated August 11th, 1875, and in full satisfaction of so much of said contract as related to a conveyance of certain pieces of land and right of way to the party of the second part (the St. Louis, Kansas City & Northern Railway Company) by the party of the first part" (the St. Louis County Railroad Company), was sufficient to put the defendants herein, or any of them, on inquiry as to the contents
354 of the agreement last aforesaid, or as to the contents of the agreement of August 11th, 1875, between the Commissioners of Forest Park, the St. Louis County Railroad Company and the St. Louis, Kansas City & Northern Railway Company.

6th. The Master erred in finding, as a matter of law, that the recital in the deed from the St. Louis County Railroad Company to the St. Louis, Kansas City & Northern Railway Company, "that all of said conveyances of said rights of way in this deed mentioned were made subject to the terms and conditions upon which the same were granted to the party of the first part," was sufficient to put the defendants herein, or any of them, on inquiry as to the terms of the agreement of August 11th, 1875, between the Commissioners of Forest Park, the St. Louis County Railroad Company and the St. Louis, Kansas City & Northern Railway Company; or as to the terms of the agreement of the same date between said railroad companies.

III.

1st. The Master erred in holding that the recording of the deed of the St. Louis County Railroad Company to the St. Louis, Kansas City & Northern Railway Company, or that anything contained in said deed was notice to defendants, Humphreys and Tutt, or to defendants, the Central Trust Company of New York, or Cheney, or either of them, of the contents of the agreement made August 11th, 1875, between the St. Louis County Railroad Company and the St. Louis, Kansas City & Northern Railway Company; or of the contents of the agreement of same date between the Commissioners of Forest Park, the St. Louis County Railroad Company and the St. Louis, Kansas City & Northern Railway Company.

355 2nd. The Master erred in finding, upon the evidence, that defendants, Humphreys and Tutt, and the Central Trust Company of New York and James Cheney, had notice of the contents of the agreement of August 11th, 1875, between the Commissioners of Forest Park, the St. Louis County Railroad Company and the St. Louis, Kansas City & Northern Railway Company.

3d. The Master erred in holding that defendants, Humphreys and Tutt, as receivers, and the Central Trust Company and Cheney, as mortgagees, do not occupy the position of purchasers without notice; and in holding that they are charged with notice of the tripartite agreement and the contents thereof.

IV.

1st. The Master erred in finding that the use by defendants of the right of way in question through Forest Park, or the estate of defendants therein, and the right of way of defendants outside said park, and between the east line thereof and the Union Depot in the city of St. Louis, which was not acquired through said St. Louis County Railroad Company, by deed of August 11, 1875, is dependent upon, or subject to the covenants and conditions contained in the "tripartite agreement," and especially the ninth clause or article thereof.

2nd. The Master erred in finding that under the act of March 25, 1874, establishing Forest Park, or under any other law of the State of Missouri, the park commissioners had authority to approve the line and grade the railroad through the park; whereas the third section of said act of March 25, 1874, specifically provides that only the grade of said railroad,
356 as far as the same runs through said Forest Park, should be approved by said park commissioners.

3d. The Master erred in holding that the "tripartite" agreement of August 11, 1875, is the source of defendants' title to

the right of way through the park; and in holding that said agreement was a link in the chain of defendants' title to said right of way; whereas it is averred in the petition, and admitted in the answer, that defendants' right of way through said park was acquired long prior to the execution of said contract.

4th. The Master erred in holding that the agreement of August 11, 1875, between said railroad companies and the park commissioners is the source of defendants' title to its right of way through the park, or a link in the chain of defendants' title to said right of way through the park or elsewhere, because said park commissioners had no legal power or authority to grant or convey any portion of said park to any person or company for any purpose.

5th. The Master erred in holding as a matter of law, that the Commissioners of Forest Park, created under the act of March 25, 1874, had legal power and authority to grant to the St. Louis County Railroad Company, and to the St. Louis, Kansas City & Northern Railway Company, or either of them, a right of way through Forest Park.

6th. The Master erred in finding that the St. Louis County Railroad Company obtained any right of way through Forest Park by grant from the commissioners of said park.

7th. The Master erred in finding that said St. Louis County Railroad Company acquired a right of way through Forest Park subject to any covenant or condition on its part
857 that it would permit the use of said right of way by other railroads, upon such reasonable terms and conditions as might be agreed upon; it being established by the testimony and admitted by the pleadings that said St. Louis County Railroad Company had acquired the right to enter upon and occupy the right of way in question for its railroad through Forest Park long anterior to the making of said tripartite agreement of August 11th, 1875, subject only to the approval of the grade thereof by said Park Commissioners.

8th. The Master erred in failing to find, under the pleadings and evidence, that the full and complete title and right of defendants to the right of way through said park, as now used by them, arose from the deed of W. D. Griswold mentioned in the pleadings and reports.

V.

1st. The Master erred in finding that the source of title of defendants to the right of way through the park was the agreement of October 29th, 1872, between the County Railroad Company and the Board of Park Commissioners established under the act of March 25th, 1872.

VI.

1st. The Master erred in finding that the full and absolute right of the St. Louis, Kansas City & Northern Railway Company to the right of way through Forest Park, to the exclusion of said St. Louis County Railroad Company, its successors and assigns, arose from a forfeiture provided for in said tripartite agreement; whereas the proof shows that said rights were acquired by forfeiture under the provisions of the contract between the St. Louis County Railroad Company
358 and the St. Louis, Kansas City & Northern Railway Company of date August 11th, 1875.

2nd. The Master erred in finding that the entry of the St. Louis, Kansas City & Northern Railway Company into the sole and absolute possession and enjoyment of all the rights, privileges, franchises, powers, immunities, improvements and property in and through said park to the exclusion of the St. Louis County Railroad Company, its successors and assigns—as it is and was provided in said tripartite agreement, and in the agreement of same date between said railroad companies, it might do, in case said St. Louis County Railroad Company should fail to pay one-half the cost of the improvements therein mentioned—it (the said St. Louis, Kansas City & Northern Railway Company) took said rights, privileges, franchises, powers, immunities, improvements and property, subject to the terms of said ninth clause or section of said tripartite agreement; and in holding that said ninth clause or section was binding upon the defendants herein, or any of them.

VII.

1st. The Master erred in finding that inasmuch as the St. Louis, Kansas City & Northern Railway Company entered into the tripartite agreement of August 11th, 1875, or took possession of a right of way through the park after the execution of said agreement, the defendants herein are estopped or prohibited from asserting title to said right of way from any other source than said agreement.

359 VIII.

1st. The Master erred in finding that the act of March 25th, 1874, establishing Forest Park, was a legislative recognition of the agreement dated October 29th, 1872, between the Board of Park Commissioners named in the act of March 25th, 1872, and the St. Louis County Railroad Company; whereas the proof shows that said agreement is in no way referred to in said act; and furthermore, that the line of the right of way through said park, mentioned in said act of March 25th, 1874, was not required to be the same as that designated in said agreement.

IX.

1st. The Master erred in holding that the ninth clause or section of the tripartite agreement of August 11th, 1875, was such a contract as a court of equity would specifically enforce between the parties thereto, or for the benefit of intervenors herein; and in holding that there was mutuality of obligation between the parties thereto, and in holding that there was mutuality of obligation between intervenors and the defendants herein, or any of them.

2nd. The Master erred in holding that the City of St. Louis has a right to enforce the provisions of the ninth article of the tripartite agreement for the benefit of other railroads in the interest of the commercial advantages of the city, and for the preservation of the park.

3rd. The Master erred in holding that whether the covenant contained in said ninth article of the tripartite agreement was one that run with the land or not, it is enforceable in
360 equity against all persons taking with notice thereof, and particularly against the defendants herein.

X.

1st. The Master erred in finding that said petitioner, the St. Louis, Kansas City & Colorado Railroad Company is such a railroad or corporation as is contemplated in the deeds, contracts and agreements mentioned in the pleadings and reports herein.

XI.

1st. The Master erred in finding that the value of defendants' railroad and right of way through the park, and up to Eighteenth street in the city of St. Louis, was only one million dollars; whereas the evidence of J. F. How and A. A. Talmage shows the cost and value of the same, for railroad purposes, to be a million and a half of dollars.

2d. The Master erred in finding, upon evidence, that an equitable basis of compensation for the use of defendants' right of way and property from the north line of Forest Park up to the terminus of said line at Eighteenth street, would be to allow interest on the value of said right of way and tracks at the rate of six per cent per annum, and by adding to this the actual expenses of repairs and maintenance of right of way and tracks, and the operating expenses of the tracks, and dividing the whole on a mileage basis, charging each road in proportion to the number of cars and locomotives run over the tracks by each, when the evidence of Messrs. Talmage and How shows the proper and equitable basis of compensation in

such cases to be, to allow interest at a reasonable rate
361 on the value of the property, to-wit: one million five hundred thousand dollars, and charging each of the two companies using the property with one-half the amount thereof, and by then distributing or dividing the actual expenses of repairs and maintenance of right of way and tracks, and the operating expenses of the property, upon a wheelage basis, charging each company with such a proportion of the total expenses for operating, maintaining, improving and repairing said right of way, tracks and property, as the number of its locomotives and cars run over said property may bear to said total expenses.

3d. Because the compensation recommended by the Master is insufficient.

4th. Because the Master erred in refusing to find that the measure of compensation, and mode of ascertaining the same, suggested by defendants, and supported by testimony of How, Talmage and other witnesses, is proper, equitable and just.

XII.

1st. The Master erred in admitting the testimony of Andrew McKinley as to his construction of the tripartite agreement, and in permitting him to state the purposes he had in view, as President of the Board of Park Commissioners, in making the same.

2d. The Master erred in admitting the testimony of J. B. Vandine, C. H. Sharman, J. W. Paramore and other witnesses, as to what would, in their opinion, be a fair and equitable compensation for the use of defendants' right of way through the park, and up to the terminus of the line at the Union Depot in St. Louis, when it was not shown that any of said wit-
362 nesses were competent or qualified to testify concerning the subject matter.

3d. The Master erred in admitting the testimony of Pitzman, Grether, Jones and others, as to the value of defendants' right of way and property in question for railroad purposes, because it did not appear that said witnesses were qualified to testify concerning the subject matter, and because their testimony as to the value of said right of way for other than railroad purposes was incompetent and irrelevant.

4th. The Master erred in admitting the agreement made October 29th, 1872, between the Commissioners of Forest Park and the St. Louis County Railroad Company, because the act under which said Commissioners were appointed and acted was unconstitutional and void.

5th. The Master erred in admitting the tripartite agreement in evidence, as it purported to affect an interest in land, and was not acknowledged or proved, as required by statute.

6th. The Master erred in admitting, against respondents' objections, certain immaterial, incompetent and irrelevant testimony.

7th. Because the findings of the Master are against law and the evidence.

8th. Because the findings of said Master are inequitable and unjust.

WELLS H. BLODGETT,
Solicitor for Defendants.

Warwick Hough,
H. S. Priest,
Eleneious Smith,
Of Counsel.

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363 Exhibit A.

This Agreement, made this eleventh day of August, A. D. 1875, by and between the St. Louis County Railroad Company, party of the first part, and the St. Louis, Kansas City and Northern Railway Company, party of the second part, witnesseth: That the party of the first part, a railroad corporation of Missouri, having acquired the title to or right of way over numerous pieces of land along its route, for a railroad, as designated on Chart "A," hereto annexed, and the deeds for which are herewith shown to the party of the second part, and the party of the second being also a railroad corporation of Missouri, and the lines and routes of said companies, as now established, being continuous and connected in this State, and for the purpose of reaching the Union Depot of St. Louis, Missouri, and other purposes, the party of the second part, desiring and requiring a right of way and the real estate necessary to establish and maintain its route thereto forever, over a part of the right of way and real estate of the party of the first part, as well as over the lands of others, and having power under the laws to acquire a right of way along its said established route, either by purchase, condemnation or otherwise, and along and over the lands of the party of the first part or others, and through Forest park as well as outside thereof.

And whereas, it is desirable and intended to have an amicable adjustment of all differences and conflicting claim and rights.

Now therefore, the parties hereto, each for itself, its
364 successors and assigns, do covenant, promise and agree, as follows:

The party of the first part, in consideration of the premises and of the covenants, promises and agreements of the party of the second part herein contained, does hereby covenant, promise and agree to grant, bargain, sell and convey by good and sufficient deed or deeds of general warranty, out of each and every tract or parcel of land now held or owned by it, and which tracts of land are designated on said chart "A," a lot twenty-eight (28) feet in width, and extending through each of said tracts, from the blacksmith shop at the junction of the Olive street road and the old Bonhomme road in St. Louis

County, to the northern line of Forest park; and also a lot of same width (28 feet), extending through each of said tracts, from the eastern line of Forest park to the western limits of the city of St. Louis; and also, a lot thirty (30) feet in width, extending through each of said tracts, from said city limits to Tayon avenue, in said city of St. Louis; and also, an undivided one-half of all the right, title or interest of the party of the first part, of, in or to the right of way, and of, in or to any and all other rights, privileges and franchises, powers and immunities owned by or vested in or enjoyed by, or that may hereafter be acquired and owned by, vested in or enjoyed by, the party of the first part, in, through or upon Forest park, by any means or from any source whatever.

It being understood, however, that where the party of the first part has only the right of way over any of said tracts outside of said park, it shall convey by said deed or deeds said right of way; and where said first party has not and
365 does not claim to have a width of land, or right of way equal to the width above called for, but some lesser width, it shall convey by said deed or deeds, all of said lesser width; but in all cases, all the right, title and interest of said party of the first part as claimed by it, shall, to the width of lot herein agreed upon, be conveyed by said deed or deeds to the party of the second part, its successors and assigns, so as to make a regular, continuous and practicable route, road-bed and right of way for the party of the second part, so far as the party of the first part is able to grant it, and as laid down and marked out on said Chart "A," hereto annexed and referred to.

And whereas, there is a tunnel and cut to be made by the party of the second part as contemplated, extending eastwardly from the eastern line of said park; said party of the second part hereby covenants and agrees to let the trains of the party of the first part pass through said tunnel and cut under the same regulations and restrictions as to running and time tables as herein agreed upon concerning trains in said park and elsewhere.

To have and to hold, all and singular, said lots, rights of way, and other property unto said party of the second part, its successors and assigns forever, with all the rights, privileges and franchises, powers, immunities, improvements and appurtenances thereto belonging or in anywise appertaining.

And with the additional and especial right and privilege to the party of the second part, its successors or assigns, to make all necessary, proper or usual cuts and fills on the property of

the party of the first part, so as to give at least twenty-
366 eight or thirty feet (as the case may be) at grade to the party of the second part for its tracks; and it is fully understood and agreed that this right and privilege to make cuts and fills shall be had and enjoyed by the party of the second part, its successors or assigns along the whole route, and shall extend not only to the lots above agreed to be conveyed but to any others it may acquire, and where the party of the first part may have or acquire lands or rights of way or other interests adjacent. Provided, however, that the use and enjoyment of the rights, privileges and franchises, powers, immunities, improvements and property in, through and upon Forest Park, and in, through and upon said proposed tunnel and cut adjoining the eastern line of Forest Park and under Barnes avenue and to the eastern end of said cut, shall and are to be in common and jointly used by the parties hereto, their successors and assigns.

But it is agreed and covenanted, that to accommodate the running arrangements of the party of the second part, said party of the second part shall have the absolute and sole control of the running, starting and regulating of the time tables of and for its own trains; and it is further agreed and covenanted, that no train, locomotive, car or other conveyance of the party of the first part, its successors or assigns, shall be allowed or attempted to be started or run within eight (8) minutes of the time fixed, or stated for the starting, coming in or running of the train or trains of the party of the second part, its successors or assigns; and there shall be twenty minutes time between the starting and coming in of the trains of the party of the second part; and this matter as to said
367 specified times shall be under the sole control and regulation of the party of the second part. And it is further agreed and covenanted, that the party of the first part shall have and maintain the only depot in said park as far as the parties hereto are concerned, and that said party of the second part shall not have a depot nor stop any of its trains in said park.

And said party of the second part, for and in consideration of the premises and other, the covenants, promises and agreements of the party of the first part herein contained, does hereby covenant, promise and agree to pay to the party of the first part, its successors and assigns, within sixty days from the delivery and ratification of these presents and the deed or deeds hereinbefore provided for, the sum of one hundred and twenty-five thousand dollars ($125,000) in currency, for which it is to make its notes in sums of five thousand dollars each, at the date and as of the date of said delivery and ratification hereof,

reserving the sum of thirty-seven thousand dollars, which sum is to be placed at said delivery and ratification in the hands and possession of John R. Lionberger, of St. Louis, as trustee, who shall therewith pay off the notes and indebtedness of said party of the first part, secured by certain deeds of trust of record on portion of the property now owned by the party of the first part, and if anything remains after said payments are made by said trustee, he shall pay it over to the party of the first part, its successors or assigns.

And whereas, at two certain points or places, to-wit: At and from the eastern line of Compton avenue, thence eastward not exceeding two hundred feet, and also at and from the point five hundred and fifty feet west from Tayon avenue, and
368 thence eastward toward Tayon avenue as far only as necessary, where the right of way or property of said party of the first part is narrowest, it may become desirable and necessary to said party of the first part to lay one rail on said property to be conveyed to said party of the second part, it is therefore hereby mutually covenanted and agreed, that at said designated places the party of the first part will use the street or streets adjacent thereto if it can legally do so, and the grade of said street or streets is suitable and conforms to the grade of the road, but if the streets cannot be so used or should not so conform, the party of the second part shall allow the party of the first part to lay and use one rail upon the property of the party of the second part for such distance as is necessary, provided, however, that the placing and running and passing of trains at said places shall be under such regulations as may be mutually agreed upon.

And it is hereby further mutually covenanted, promised and agreed that neither party shall in any manner, directly or indirectly, interfere with, obstruct, hinder or compete with the other in acquiring its own property or right of way for a continuous line or route as herein contemplated, and on Chart "A" marked down, or in having, holding and enjoying any right of way or property when so acquired. And where proceedings for condemnation or other process, or proceedings or negotiations have been commenced by the party of the first part or on its behalf, the same shall, as to the width hereby agreed to be conveyed and contemplated to be acquired and enjoyed to and by the second party, be discontinued or prosecuted as the party of the second part, by its president, may in
369 writing direct, and within five days thereafter, said second party paying the damages and expenses therefor.

And whereas, under this agreement, and a certain agreement between the parties hereto and the Commissioners of Forest Park, of even date herewith, the party of the second part is

about to and hereby in consideration of the covenants and agreements of the party of the first part, hereinafter particularly set forth, and of the covenants and agreements of said Commissioners of Forest Park in said agreement with them contained, does covenant and agree to construct and maintain a railroad bed and road in, upon and through said Forest Park and the tunnel and cut hereinbefore specified, according to certain plans and specifications agreed upon, and according to the terms and conditions of said agreement with said Commissioners for the joint use of both the parties (of the first part and of the second part) hereto, their several successors and assigns.

And in consideration of all the premises, and as inducement to said party of the second part to proceed with said construction and maintaining, the party of the first part does hereby covenant, promise and agree to pay to the party of the second part, its successors and assigns, within two years from the delivery of these presents, as shall be indorsed hereon by either party, one-half of the actual cost of construction of said roadbed and road through said park and said tunnel and cut, unless within said two years said party of the first part determines it will not use the same or any part thereof, and delivers to said party of the second part a good and sufficient deed, granting and conveying to said party of the second part, its successors
370 and assigns, any and all right, title or interest in law or in equity it may have in and to said roadbed, road or property in said park, tunnel and cut, free and clear of all incumbrances. And if said election and conveyance is not made within the time specified by it, said party of the first part does covenant and agree to pay besides one-half of the cost of construction, also the one-half of the actual cost of maintaining said roadbed and road in, upon and through said park and said tunnel and cut, from and after the time the party of the first part commences to use the same during or within the said period of two years, and as long as it continues to use the same, within said period of two years, and if it continues to use the same after said period of two years, then forever thereafter, whether it uses the same or not.

And for the purpose of fixing said payments to be made, it is agreed that the said cost of construction is to be taken and paid at whatever sum may be sworn to in affidavits, by any chief engineer and treasurer of the party of the second part, as correct and as appearing on and from the construction account on the books of said second party, and said costs of maintaining is to be taken and paid at whatever sum may be sworn to in affidavits by the superintendent and treasurer of the party of the second part, and as appearing upon and from the books of said second party. And it is further expressly understood,

covenanted and agreed that should said party of the first part, its successors or assigns, fail or refuse to make the said payments or either of them, or any part thereof on demand at any time after the same or either of them becomes due or payable as aforsaid, and as often as the same may occur, and for
371 sixty days after such demands, then all the rights, privileges, franchises, powers, immunities, improvements and property of said party of the first part, in, through or upon said Forest Park, and in, into, through, over or upon said tunnel and cut shall become, by virtue and force of said failure and refusal, without further process or proceedings, forfeited and belong to the party of the second part, its successors and assigns; and in case of such forfeiture no further payments, as above provided, are to be made by the party of the first part, but the party of the second part may and hereby is fully authorized and empowered to at once enter upon the sole and absolute possession and enjoyment of all said rights, privileges, franchises, powers, immunities, improvements and property to the exclusion of said party of the first part, its successors and assigns, and said party of the first part hereby further covenants and agrees for itself, its successors and assigns, upon its failure to pay as aforeaid, that it (said first party), shall and will by a good and sufficient deed convey all said rights, privileges, franchises, powers, immunities, improvements and property to said party of the second part, its successors and assigns.

It is further covenanted and agreed that the party of the first part may, within said period of two years from the delivery of these presents, lay a third rail for a narrow gauge track through said park, tunnel and cut, provided the same be done in a manner not to interfere with running of trains or operation of the road as it requires by the party of the second part. And provided further, that whether it lays a third rail or not, the party of the first part is to make payment for construc-
372 tion and maintaining of said road and roadbed as herein above provided.

In testimony whereof, the said parties hereto have caused these presents to be executed by their respestive presidents, and attested by their respective corporate seals with the signature of their respective secretaries, the day and year first above mentioned.

(Seal) THE ST. LOUIS COUNTY RAILROAD CO.,
By Joseph Brown, President.

Attest: H. R. Briggs, Secretary.

(Seal ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY CO.
By B. W. Lewis, Jr., President.

Attest: James F. How, Secretary.

373 Exhibit B.

This Agreement, made this eleventh day of August, 1875, by and between the Commissioners of Forest Park, of the City and County of St. Louis, Missouri, party of the first part, and the St. Louis County Railroad Company, its successors or assigns, party of the second part, and the St. Louis, Kansas City and Northern Railway Company, its successors or assigns, party of the third part:

Witnesseth, that said Forest Park Commissioners, in consideration of the relinquishments, agreements and stipulations hereinafter contained on the part of said party of the second part, do hereby accept and approve the line and grade of said railroad as laid down and described upon the accompanying plat and profile hereto attached, and forming part of this agreement; and said line and grade, in case there is no forfeiture of this agreement, is hereby fixed as the sole and finally established right-of-way, to which said party of the second part is entitled by statute, or otherwise, through said park, or any part thereof, and the width of said right-of-way, as established by statute, is hereby reduced from seventy (70) feet and fixed at forty-two (42) feet between its outer points; but it is understood and agreed, that said party of the second part or its assigns, shall have the right to excavate or deposit earth outside of said forty-two (42) feet whenever and wherever it may becomes necessary to do so, to make the cuts, fills and em-
374 bankments for said railroad in its construction.

And said party of the second part, in consideration of the foregoing agreements on the part of said Park Commissioners, does hereby relinquish twenty-eight (28) feet off the seventy (70) feet, established by statute, for its right-of-way through Forest Park, except in case of a forfeiture of this agreement, and provided that in case the right-of-way herein described and established, shall not be promptly placed at the disposal and to the use of said party of the second part, or its assigns, or in case of any unreasonable delay or hindrance on the part of said Park Commissioners in regard to placing said party of the second part, or its assigns, in possession of said right-of-way under the terms and conditions of this agreement, then, and in such case at the option of the said party of the second part, or its assigns, said want of promptness or said delay or hindrance shall work a forfeiture of this agreement, and in case of any forfeiture of this agreement, the parties hereto shall be restored to all their rights as fully and absolutely as if this agreement had never been made and entered into. It is further mutually understood and agreed by and between the parties to this agreement as follows, to-wit:

First. That the party of the second part, or its assigns, shall, at their own cost and expense, make and construct, or cause to be made and constructed, the excavations and embankments required for their roadbed, in accordance with the grade line, as laid down on the profile hereto attached, and that all extra earth not required in said construction shall be hauled and dumped where, and as directed by said Park Commissioners; provided, however, that all extra haul therefor shall be paid by said Park Commissioners.

Second. The party of the second part, or its assigns, shall, also, at their cost and expense, make and construct, or cause to be made or constructed, a tunnel for a continuous distance of one hundred (100) feet, commencing at the east line of Barnes Avenue, where the same is intersected by the line of said railroad, running thence westwardly under Barnes Avenue and extending the entire distance of said one hundred (100) feet, and the remainder of said excavation shall continue an open cut, or be roofed over, at the option and cost of said Park Commissioners.

Third. The slopes of said excavations and embankments shall be sodded or sown with grass by said party of the second part, or its assigns, and the ties neatly covered, and all shall be so kept and maintained by said party of the second part, or its assigns, and in case of failure so to do by said party of the second part, or its assigns, the said Park Commissioners may do so at the expense of said party of the second part, or its assigns; provided, however, that in case said Park Commissioners desire to have said slopes of the excavations and embankments constructed at a gentler slope, or less steep than that required by said party of the second part, or its successors or assigns, said Park Commissioners may do so at their own cost and expense of additional construction and maintenance.

Fourth. The tracks and roadbed through said park shall be fenced in or roofed over by and at the option of said party of the second part, or its successors or assigns, in an ornamental manner, to be agreed upon by the parties hereto.

Fifth. A depot shall be built and permanently maintained, on a plan and at a place to be approved by the parties of the first and second parts, and said party of the second part, and its assigns shall contribute three thousand (3000) dollars, in cash, towards the payment thereof; provided that said depot shall be located wholly outside of the right-of-way of the party of the second part, as herein provided, but immediately adjoining the track or siding thereof.

Sixth. There shall be a switch or siding, the location of which shall be fixed by the consent of the parties and outside of said right-of-way, at said depot, to be used only by trains stopping in said park, said depot and siding to be used only for park purposes by the party of the second part, or its successors or assigns thereto.

Seventh. All said tracks, depot, slopes and permanent improvements of the party of the second part shall be kept and maintained in a clean and neat condition, or in default thereof, said Park Commissioners may do so at the reasonable expense of said party of the second part, or its assigns, and no material alteration or change shall be permitted in said tracks without the consent of all the contracting parties hereto, nor in said depot or siding without the consent of the parties of the first and second parts hereto.

Eighth. The work of constructing said railroad through said park shall be commenced in good faith by the party, as hereinafter specified, within ninety (90) days from the delivery hereof, and shall be completed in one year thereafter, under
377 penalty of a forfeiture of this agreement, and upon completion thereof, the railroad shall be operated through said park so as to prevent unnecessary noise or inconvenience to the public, as far as reasonably practicable, and the roads, or their assigns, shall comply with all reasonable rules or regulations of said Park Commissioners, in that respect, and all of the aforesaid permanent improvements shall be kept and maintained in such condition as will not injuriously affect or mar the landscape beauty of the park, this provision referring to the aforesaid forty-two (42) feet right-of-way roadbed. And said party of the second part, or its assigns, shall also keep its police, or guard, within the limits of the park, neatly uniformed.

Ninth. Said party of the second part shall permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park and up to the terminus of its road in the City of St. Louis, upon such terms and for such fair and equitable compensation, to be paid to it therefor, as may be agreed upon by such companies.

Tenth. Said party of the second part hereby admits that its right-of-way hereinbefore described, with the conditions above stated, is not exclusive of a right-of-way to any other railroad through any other portion of said park, and nothing herein contained shall be construed to limit or impair any right now held, or which may hereafter be conferred upon said Park Commissioners to grant to other railroads a right-of-way over or above or under other portions of said park.

Eleventh. This agreement, on the part of the parties of the second and third parts, shall, within a reasonable time, as soon as practicable, be ratified by a majority in interest of
378 the stockholders of said railroad companies.

Twelfth. And, whereas, for the purpose of enabling the party of the third part to reach the Union Depot, of St. Louis, Missouri, an amicable arrangement and agreement for a right-of-way outside of and through said Forest Park has been made and entered into by and between the parties of the second and third parts, and in pursuance thereof the parties of the second and third parts are to enter upon and enjoy the right of way and all the rights, privileges, immunities, powers, improvements and property belonging to, or vested in, or that may belong to, or vest in the party of the second part, in common, in, upon, and through said park, under certain regulations, terms and conditions agreed upon by and between said parties therein. And, whereas, the party of the third part in further pursuance of said last named agreement, is about to construct, maintain and operate a railroad, in, upon, and through said park, at great expense, and to engage in other great outlays and to assume other heavy burthens and responsibilities to be of advantage to said third party, through the continued enjoyment of said right of way and other rights, privileges, powers, franchises, immunities, improvements and property in, upon and through said park. Now, therefore, in view of the premises, and as inducements to said party of the third part to proceed as intended, the party of the first part does hereby grant and convey unto, and license and permit the said party of the third part, its successors and assigns, to have, hold, use and enjoy said right of way, in, upon and through said park in common with, and to be held and enjoyed, jointly, with said party of the second part, and its assigns on
379 the terms of the said contract between them and under the same terms and conditions as are hereby and hereinbefore imposed upon said party of the second part, and which are hereby assumed by said party of the third part as to improvements except as to building a depot and switch in said park, which the party of the second part is to do itself, or in case said party of the second part, its successors or assigns should forfeit its said rights, privileges and franchises, in, upon and through said park, or from any cause, cease to have, maintain or enjoy the same, then it is hereby agreed and covenanted that the party of the third part shall not also be excluded from said park, but shall, with its successors and assigns, continue to have, maintain and enjoy all of said rights, privileges, immunities, franchises, improvements and property on the terms herebefore set forth, continuously and forever.

Thirteenth. As said party of the second part, and its assigns is as above provided, to have, and maintain a depot in said park, said party of the third part is hereby released from maintaining or having any depot therein, and it is agreed, said party of the third part shall not have or maintain any depot in said park, but said party of the second part shall erect and maintain said depot.

Fourteenth. It is hereby expressly understood, covenanted and agreed, by all of the parties hereto, that said contract of even date herewith, has been made between the parties of the second and third parts hereto, by which the party of the third part hereto, has agreed with the party of the second part hereto, that it will execute, perform and comply with all of the terms, provisions and things herein to be done, per-
380 formed or complied with by the party of the second part hereto as to said improvements except the depot and switch in said park. Now, therefore, in consideration thereof, and of the agreement of the party of the third part herein, the party of the first part herein accepts the agreement and contract of the party of the third part herein to execute, perform and comply with all of the terms, provisions and things herein mentioned to be done, performed or complied with, as to said improvements, except as aforesaid, by the party of the second part hereto, and in lieu and stead of said party of the second part hereto, so far as assumed, as aforesaid, releasing it therefrom, and in consideration thereof the party of the third part hereto covenants and agrees with the other parties hereto, that it will in lieu and stead of the party of the second part hereto, do, perform and comply with all the terms and provisions, matters and things herein expressed, to be done, performed or complied with, by said party of the second part, as to said improvements, except as aforesaid, subject to the terms and conditions in said agreement of even date herewith contained, and it is hereby expressly covenanted and agreed, that a compliance by the party of the third part for itself, or for itself and the party of the second part jointly, in the construction of said railroad, in, upon and through said park, tunnel and cut in accordance with the terms of this agreement, shall be taken and accepted as performance of the conditions imposed upon said party of the second part. And it is further expressly covenanted and agreed, that all and every part of the work, its kind, description and extent, to be per-
381 formed by either of said parties of the second or third parts is herein above expressed, and neither of said parties shall be held or required to do or perform any other or further work and conditions than those hereby definitely set forth. And it is further understood, covenanted and agreed,

that neither of the parties of the second or third parts are required or expected to supply the material or do the work necessary to construct or maintain either of the arched entrances into or exits from said park as marked on the plat and profile hereinbefore referred to, but that said arches, material and work are to be done and paid for by the parties of the first part. And said parties of the first part shall proceed and erect said arches, entrances or exits, expeditiously and so as to cause no delay to the parties of the second and third parts, or either of them in constructing, maintaining and operating said railroad or either of them.

In testimony whereof, the Board of Commissioners of Forest Park have caused this agreement, after having been approved by the Board, to be signed by the President with the seal of the Board attached, and attested by the Secretary of said Board, and the said parties of the second and third parts hereto have caused these presents to be executed by their respective presidents and attested by their respective corporate seals, with the signatures of their respective secretaries the day and year first above mentioned.

BOARD OF COMMISSIONERS OF FOREST PARK,

By Andrew McKinley, President.
Attest: Chas. Bland Smith, Secretary.

Copy of Seal.
Forest Park Seal, St. Louis, Mo., Forest Park,
West av. East av.
South av. North av.

382 THE ST. LOUIS COUNTY RAILROAD CO.

By Joseph Brown, President.
Attest: D. H. Driggs, Secretary.

Copy of Seal.
The St. Louis County Railway Company, Missouri.

ST. LOUIS, KANSAS CITY & NORTHERN R'Y. CO.

By S. W. Lewis, Jr., President.
Attest: James F. How, Secetrary.

Copy of Seal.
St. Louis, Kansas City and Northern Railway Co.
1872.

Filed and recorded September 5th, 1879, at 9:45 a. m.

C. W. IRWIN, Recorder.

Note.—The words "part hereto" on line 22 and "part for" on line 36, page 11 of this record are interlined in the original instrument.

State of Missouri,
City of St. Louis—ss.

I, the undersigned Recorder of Deeds for said State, certify the foregoing to be a true copy of an instrument of writing executed by the Commissioners of Forest Park et al., together with the plats annexed thereto and date of filing and recording thereof as the same remains on record in my office in Book 620, Page 8.

Witness my hand and official seal, this 18th day of December, A. D. 1884.

(Seal) THOMAS F. FARRELLY, Recorder.

383 Exhibit C.

This indenture, made the Eleventh day of August, in the year of our Lord, One Thousand Eight Hundred and Seventy-five, by and between The Saint Louis County Railroad Company, a corporation duly organized under and in accordance with the General Statutes of the State of Missouri, party of the first part, and the St. Louis, Kansas City & Northern Railway Company, also a corporation duly organized under and in accordance with the General Statutes of the State aforesaid, party of the second part. Witnesseth: That the party of the first part for and in consideration of the sum of One Hundred and Twenty-five Thousand Dollars ($125,000) lawful money of the United States to it duly paid by the party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged and in pursuance of the terms of a certain contract made and executed by and between the parties of the first and second parts hereto and dated August Eleventh, A. D., 1875, and in full satisfaction of so much of said contract as relates to the conveyance of certain pieces of land and right of way to said party of the second part by said party of the first part, hath granted, bargained, sold, aliened, remised, released, conveyed and confirmed and by these presents doth grant, bargain, sell, alien, remise, release, convey and confirm unto the party of the second part, and its successors and assigns forever, all the following pieces of land, situate, lying and being in the City of St. Louis and State of Missouri, to-wit:

First. All that certain piece of land situate as aforesaid, between Tayon Avenue and Mercer Street in City Block numbered sixteen hundred and seventy-four (1674), bounded and described as follows, to-wit: Beginning at a point on the West-

ern line of Tayon Avenue, seventeen (17) feet South of the Northeast corner of the land of the party of the first part, running thence Southwardly thirty (30) feet along said Western line of Tayon Avenue to the Northern line of the land of the Pacific Railroad Company (of Missouri), thence Westwardly four hundred and seventy-eight (478) feet on a line parallel to the first alley South of Randolph Street, thence Southwestwardly four hundred and fifty (450) feet along the South-
384 ern line of the land of the party of the first part, to the Western line of said block, at a point one hundred and twenty-two (122) feet, South of the North line of the land of the party of the first part, thence Northwardly on a line parallel to said Mercer Street to a point thirty (30) feet distant from the last-named line measured at right angles thereto, thence Northeastwardly and parallel to said Southwestwardly line four hundred and fifty (450) feet to a point, thence Eastwardly and parallel to said first alley south of Randolph Street four hundred and seventy-eight (478) feet more or less to the point of beginning.

Second. All that certain piece of land situate as aforesaid, between Tayon Avenue and Mercer Street, being in City Block numbered sixteen hundred and ninety (1690), bounded and described as follows, to-wit: Beginning at a point on the East line of said block, one hundred and twenty-two (122) feet South of the Northern line of the land of the party of the first part, running thence Southwestwardly along the Southern line of the land of the party of the first part two hundred and sixty-seven (267) feet more or less to the Eastern line of said Mercer Street, thence Northwardly along said Eastern line of Mercer Street to a point thirty (30) feet distant from the last-named line measured at right angles thereto, thence Northeastwardly and parallel to said Southwestwardly line two hundred and sixty-seven (267) feet more or less, to the intersection of the Eastern line of said block, thence Southwardly along the said Eastern line of said block to the point of beginning.

Third. All that certain piece of land situate as aforesaid, between Mercer and Noeme Streets, in City Block number seventeen hundred and four (1704), and being parts of lots numbered seventeen (17), eighteen (18), nineteen (19), twenty (20) and twenty-one (21), bounded and described as follows, to-wit: Beginning at a point in the Western line of said Mercer Street, fifty (50) feet South of the Northeast corner of said Block, running thence Southwestwardly along the Southern line of the land of the party of the first part one hundred and forty (140) feet more or less to a point on the Western line of said lot numbered seventeen (17) one hundred (100) feet South of the South line of Scott Street, thence Northwardly along said

Western line of said lot numbered seventeen (17) to a point thirty (30) feet distant from the last named line measured at right-angles thereto, thence Northeastwardly and parallel to said Southwestwardly line one hundred and forty (140) feet more or less to the said Western line of Mercer Street, thence Southwardly along said Western line of Mercer Street to the point of beginning.

385 Fourth. All that certain piece of land situate as aforesaid, between Mercer and Noeme Streets, in City Block, numbered seventeen hundred and four (1704), being a part of the lots numbered fourteen (14) and fifteen (15), bounded and described as follows, to wit: Beginning at a point on the Eastern line of said lot numbered fifteen (15), one hundred and ten (110) feet south of the south line of Scott Street, running thence Southwestwardly along the Southern line of the land of the party of the first part fifty-five (55) feet more or less to a point in the Western line of said lot numbered fourteen (14), thence northwardly along the said Western line of said lot to a point thirty (30) feet distant from the last named line measured at right-angles thereto, thence Northeastwardly and parallel to said Southwestwardly line fifty-five (55) feet more or less to the Eastern line of said lot numbered fifteen (15), thence Southwardly along the said Eastern line of said lot to the point of beginning.

Fifth. All that certain piece of land situate as aforesaid, between Mercer and Noeme Streets, in City Block, numbered seventeen hundred and four (1704), and being part of lots numbered seven (7) and eight (8), bounded and described as follows, to wit: Beginning at the Northeast corner of said lot numbered seven (7), running thence Southwardly along the West line of the first alley East of and parallel to said Noeme Street to the Southern line of the land of the party of the first part, thence Southwestwardly along said Southern line to the Eastern line of said Noeme Street, thence Northwestwardly along said Eastern line of Noeme Street to a point thirty (30) feet distant from the last named line measured at right-angles thereto, thence Northeastwardly by a line parallel to the said Southwestwardly line of the intersection of the Northern line of said lot numbered seven (7), thence Eastwardly along the Northern line of said lot numbered seven (7), to the point of beginning.

Sixth. All that certain piece of land situate as aforesaid, between Noeme and High Streets, being in City Block, numbered twenty-two hundred and seventy-two (2272), bounded and described as follows, to wit: Beginning at a point on the South Side of Half Street, eighty (80) feet West of the Northeast corner of said Block, running thence in a Southwestwardly

direction three hundred and forty-seven (347) feet more or less along the Southern line of the land of the [property] of the first part, to the Southwest corner thereof, one hundred and twenty-four (124) feet South of the South line of
386 Half Street, thence Northwardly along the West line of the land of the party of the first part, and parallel to said High Street, to a point thirty (30) feet distant from the last named lines measured at right-angles thereto, thence Northeastwardly by a line parallel to said Southwestward line to the intersection of Half Street, thence Eastwardly along the Southern line of Half Street, to the point of beginning.

Seven. All that certain piece of land situated as aforesaid, between High Street and Jefferson Avenue, in City Block, numbered seventeen hundred and seven (1707), being part of lots numbered fourteen (14), fifteen (15), sixteen (16) and seventeen, (17) bounded and described as follows, to wit: Beginning at a point in the Western line of said High street at the Southeast corner of the land of the party of the first part, running thence Southwestwardly along the Southern line of the land of the party of the first part one hundred and sixty-four (164) feet more or less, to the Southwest corner of the land of the party of the first part, thence Northwardly along the Western line of said lot numbered seventeen (17), to a point thirty (30) feet distant from the last named line measured at right-angles thereto, thence Northeastwardly by a line parallel to said Southwestern line one hundred and sixty-four (164) feet more or less to the said West line of High Street, thence Southwardly along said line of High Street to the point of beginning.

Eighth. All that certain piece of land situate as aforesaid, between High Street and Jefferson Avenue, bounded and described as follows, to wit: Beginning at a point at the intersection of the South line of Gratiot or Cooper Street with the Northern line of the land of the said Pacific Railroad Company four hundred and twenty-seven feet and six (427.6) inches, more or less East of said Jefferson Avenue, running thence Southwestwardly along the Southern line of the land of the party of the first part four hundred and fifty (450) feet more or less to the Eastern line of said Jefferson Avenue, thence Northwardly along the Eastern line of Jefferson Avenue to a point thirty (30) feet distant from the last-named line measured at right angles thereto, thence Northeastwardly by a line parallel to said Southwestern line to the intersection of the Southern line of Gratiot or Cooper Street, thence Eastwardly along said Southern line of Gratiot or Cooper Street to the point of beginning.

Ninth. All that certain piece of land, situate as aforesaid, between Jefferson and Summit Avenues, being in City Blocks numbered twenty-two hundred and fifty-two (2252) and twenty-two hundred and fifty-seven (2257), bounded and described as follows, to wit: Beginning at a point on the Eastern
387 line of Jefferson Avenue forty-two (42) feet South of the Southern line of Cooper Street and at the Southeast corner of the land of the party of the first part, running thence Westwardly along the Southern line of the land of the party of the first part and the Northern line of the land of the said Pacific Railroad Company ten hundred and seventy-one (1071) feet more or less to the Southwest corner of the land of the party of the first part, ninety-two (92) feet South of the South line of Cooper Street, thence Northwardly along the Western line of the land of the party of the first part, and parallel to said Summit Avenue to a point thirty (30) feet distant from the last-named line measured at right angles thereto, thence Eastwardly by a line parallel to said Westwardly line and the Southern line of the land of the party of the first part, ten hundred and seventy-one (1071) feet more or less to the said Western line of Jefferson Avenue, thence Southwardly along the western line of Jefferson Avenue to the point of beginning.

Tenth. All that certain piece of land situate as aforesaid, between Montrose and Maguire Avenues in City Block numbered twenty-five hundred and forty-nine North (2549 N.), being part of lot numbered Twelve (12), bounded and described as follows, to wit: Beginning at a point on the Eastern line of said lot, ninety-one feet and seven inches (91. ft. 7 in.) South of the South line of Cooper street; running thence Westwardly along the Southern line of the land of the party of the first part to the western line of said lot, thence Northwardly along the Western line of said lot to a point thirty (30) feet distant from the last named line measured at right angles thereto, thence Eastwardly by a line parallel to said Western line to the Eastern line of said lot, thence Southwardly along the said Eastern line to the point of beginning.

Eleventh. All that certain piece of land, situate as aforesaid, between Montrose and Maguire Avenues, in City Block numbered twenty-five hundred and forty-nine North (2549 N.), being a part of lots numbered one (1), two (2) and three (3), bounded and described as follows, to wit: Beginning at the Southeast corner of said lot numbered three (3), it being also the Southeast corner of the land of the party of the first part, running thence Westwardly along the Southern line of said lots and the Southern line of the land of the party of the first part,

eighty-two (82) feet more or less to the Eastern line of said Maguire Avenue, thence Northwardly along the Eastern line of Maguire Avenue to a point thirty (30) feet distant from the last named line measured at right angles thereto, thence
388 Eastwardly by a line parallel to said Westwardly line to the Eastern line of said lot numbered Three (3), thence Southwardly along said Eastern line to the point of beginning.

Twelfth. All that certain piece of land situate as aforesaid, between Maguire and Compton Avenues in City Block numbered twenty-two hundred and thirty-six North (2236 N.), being part of lot numbered sixteen (16), bounded and described as follows, to wit: Beginning at a point in the Western line of Maguire Avenue sixty-five feet seven and one-fourth inches (65 ft. 7¼ in.) South of the South line of Cooper street, it being the Southeast corner of said lot, running thence Westwardly along the Southern line of said lot to the Southwest corner thereof, thence Northwardly along the Western line of said lot to a point thirty (30) feet distant from the last named line measured at right angles thereto, thence Eastwardly by a line parallel to said Westwardly line to the Western line of Maguire Avenue, thence Southwardly along the said Western line of Maguire Avenue to the point of beginning.

Thirteenth. All that certain piece of land situate as aforesaid between Maguire and Compton Avenues, in City Block, numbered twenty-two hundred and thirty-six North (2236 N.), being the Southern part of lots numbered one (1), two (2), three (3), four (4), five (5), six (6) and seven (7), bounded and described as follows, to wit: Beginning at the Southeast corner of said lot numbered seven (7), it being forty-nine feet and two inches (49-2) south of the south line of Cooper street, running thence Westwardly along the Southern line of said lots one hundred and seventy-eight feet and five and one-half inches (178.5½), more or less to the Southwest corner of said lot, numbered one (1), thence Northwardly along the Eastern line of said Compton Avenue to a point thirty (30) feet distant from the last named line measured at rights angles thereto, thence Eastwardly by a line parallel to said Westwardly line to the Eastern line of said lot numbered seven (7), thence southwardly along said eastern line of said lot to the point of beginning.

Fourteenth. All that certain triangular piece of land situate as aforesaid, between Compton and Ranken Avenues, being in City Block, numbered Twenty-two hundred and thirty-one (2231), bounded and described as follows, to wit: Beginning at the Northeast corner of the land of the party of the first part, running thence Southwestwardly twenty-eight feet (28)

feet along the West line of Compton Avenue, thence Northwestwardly one hundred and seventeen (117) feet along the Northern line of the land of said Pacific Railroad Company to
389 a point in the Northern line thereof, and thence Eastwardly one hundred and fourteen (114) feet, more or less along the lands of David Ranken, Jr., to the point of beginning.

Fifteenth. All that certain piece of land situate as aforesaid between Ranken and Theresa Avenues, being part of City Block numbered twenty-two hundred and seventeen (2217), bounded and described as follows, to-wit: Beginning at a point on the western line of Ranken Avenue, at the Southeast corner of the land of the party of the first part, running thence Northwestwardly four hundred and twenty-five (425) feet along the Southern line of the land of the party of the first part, the Northern line of the land of the said Pacific Railroad Company to the Eastern of said Theresa Avenue, thence Northwardly along the Eastern line of Theresa Avenue to a point thirty (30) feet distant from the last named line measured at right angles thereto, thence Southeastwardly by a line parallel to said Northwestwardly line four hundred and twenty-five feet (425) feet more or less to the Western line of said Ranken Avenue, thence Southwardly along the Western line of Ranken Avenue to the point of beginning.

Also all of the following described pieces of land, situate, lying and being in the County of St. Louis and State of Missouri aforesaid, to-wit:

First. All that certain piece of land situate as aforesaid between Cabanne Street and the Manchester Road, bounded and described as follows, to-wit: Beginning at a point on the Eastern line of the land of the party of the first part twenty-two (22) feet North of the Southeast corner of said tract of land running thence Westwardly by a curved line bearing North to the Northeast corner of the land of Thomas Brooks, and the Southeast corner of the tract of land conveyed to said party of the first part, by the said Brooks by deed dated March 29th, 1873, and recorded in the County Recorder's office of St. Louis County in Book 461, page 524, thence Westwardly along the Southern line of the land of the party of the first part, two hundred and thirty-six (236) feet to the Southwest corner of said tract, thence Northwardly along the Western line of said tract of land to a point twenty-eight (28) feet distant from the last named line measured at right angles thereto, thence Eastwardly by a line parallel to said Westwardly line and said

curved line respectively to the Eastern line of the land
390 of the party of the first part, thence Southwardly along said Eastern line and along the Western line of the land now or formerly owned by William G. Webb, to the point of beginning.

Second. All that certain piece of land situate as aforesaid being a part of United States Survey, numbered sixteen hundred and fifty-seven (1657), bounded and described as follows, to-wit: Beginning at a point in the Western line of Musick's Addition, seventeen (17) feet South of the Northern line of said Survey and of the Northeast corner of the land of the party of the first part, running thence Southwardly along the said Western line of Musick's Addition and the Eastern line of the land of the party of the first part, twenty-eight (28) feet, thence Westwardly along the Southern line of the land of the party of the first part and the Northern line of land of Ghio and Lebeaume respectively, eight hundred and sixty-four feet, three inches (864 ft. 3 in.) to the Southwest corner of the land of the party of the first part, thence Northwardly along said Western line of the land of said first party, and parallel to the Western line of Musick's Addition twenty-eight (28) feet, thence Eastwardly by a line parallel to said Westerly line to the point of beginning.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, all the estate, right, title, interest, property, possession, claim and demand whatsoever as well in law as in equity of the said party of the first part, in and to the same and every part and parcel thereof, with the appurtenances. To Have and to Hold the above granted, bargained and described premises with the appurtenances unto the said party of the second part, and its successors and assigns to its and their own proper use, benefit and behoof forever. And said party of the first part for itself and its successors the above described and hereby granted and released premises and every part and parcel thereof with the appurtenances unto the said party of the second part and its successors and assigns against the said party of the first part and its successor and against all and every person and persons whomsoever lawfully claiming or to claim the same shall and will by these presents Warrant and forever Defend.

And also the said party of the first part hath conveyed, assigned and transferred and by these presents doth con-
391 vey, assign and transfer unto the said party of the second part and to its successors or assigns all its right,

title, interest, estate, claim and demand as well in law as in equity of, in and to the following piece of land situate, lying and being in the County of St. Louis and State of Missouri aforesaid, bounded and described as follows, to-wit:

First. The right of way over and upon the following described piece of land situate as aforesaid between the Manchester Road and King's Highway and being all of said right of way, granted to said party of the first part by John S. Mc Cune by deed, dated November 29th, 1871, and recorded in the Recorder's Office of St. Louis County aforesaid, in Book 439, page 355, bounded and described as follows, to-wit: A strip of land twenty-five (25) feet wide, extending from the Northwest corner of the land of said McCune and one Dougherty, N. 81°, West along the North line of said McCune's land for a distance of seventy-seven (77) feet, thence on a strip forty (40) feet wide, embraced in parallel lines equally distant from a central line beginning at the Northwest corner of the above described strip, and running thence Westwardly by a curve bearing Southward, having a radius of twenty-three hundred and sixty-five (2365) feet for a distance of four hundred (400) feet, thence by a straight line S. 80° 10′ W., for a distance of one hundred and thirty-five (135) feet, thence by a curve Northward having a radius of twelve hundred and eighty-seven (1287) feet for a distance of three hundred and ninety-five (395) feet, and thence by a straight line N. 72° 50′ West for a distance of two hundred and ten (210) feet to King's Highway, saving and excepting a strip of land twelve (12) feet in width off and from the Northern part of said right of way and for the whole length thereof, which said strip of land is reserved to the party of the first part.

Second. The right of way over and upon the following described piece of land situate as aforesaid between Kings Highway and Union Avenue, being a strip of land twenty-eight (28) feet in width off the Southern portion, and for the whole length thereof of that part of the right of way granted to said party of the first part by W. D. Griswold, by deed, dated November 3, 1871, and recorded in the office of the Recorder of St. Louis County aforesaid, in Book 443, Page 96, lying between the Northern line of Forest Park and the Eastern line of Union Avenue, all of which right of way conveyed by said deed is described as follows, to-wit: A strip of land forty (40) feet in width, the centre line of which begins at Kings Highway,
twenty (20) feet North of the Southeast corner of the
392 land of said Griswold, known as the Cabanne Dairy
Farm, and running thence Westwardly along parallel to the South line thereof, eight hundred and twenty-five (825) feet, thence by a curve eleven hundred and seventy (1170) feet

long, [earing] Northwest, with a radius of nineteen hundred and three (1903) feet, thence by a line bearing North 55° W., about ten hundred and ninety (1,090) feet to a point on Union Avenue not less than four hundred and eighty-seven (487) feet South of the Northeast corner of Robert Forsyth's land.

Third. All that certain piece of land situated as aforesaid, between Mercer and Noeme Streets, in City Block S., No. 1704, and being parts of lots numbered 17, 18, 19, 20 and 21, bounded and described as follows, to-wit: Beginning at a point, thence Southwardly along said West line of High Street to the point of beginning.

The right of day over and upon the following described pieces of land, situate as aforesaid between Union avenue and the Skinker road, being a strip of land twenty-eight (28) feet in width off and from the entire southern portion of a part of the right of way granted to said party of the first part by Robert Forsyth, by deed dated November 17, A. D. 1871, and recorded in the office of the Recorder of St. Louis County aforesaid, in Book 442, page 55, which said part of the right of way so granted as aforesaid, is bounded and described as follows, to-wit: A strip of land forty (40) feet wide, equally divided, twenty (20) feet on each side of a central line, commencing at a point in the western line of Union avenue, four hundred and eighty (480) feet south of the northeast corner of the land of said Robert Forsyth, running thence in a northwest direction to a point on the dividing line between the lands of the estate of James W. Kingsbury, deceased, and of the said Robert Forsyth, about ten hundred and fifty-five (1055) feet west of the western line of Union avenue.

Fourth. The right of way over and upon the following piece of land situate as aforesaid, between Union avenue and the Skinker road, bounded and described as follows, to-wit: A strip of land thirty (30) feet in width and being all of that portion of the right of way granted to said party of the first part by said Robert Forsyth by deed aforesaid, lying along the northern line of his land and adjoining the land of the said Kingsbury estate, between a point ten hundred and fifty (1050) feet west of Union avenue, and running thence westwardly to a point thirty-one hundred and twenty-five (3125) feet west of Union Avenue.

393 Fifth. The right of way over and upon the following described piece of land, situate as aforesaid, between Union Avenue and the Skinker road, bounded and described as follows, to-wit: A strip of land twenty-eight (28) feet in width off and from the southern portion and for the entire

length thereof of the right of way granted to said party of the first part by A. M. Waterman and others, by deed dated April 14th, A. D. 1873, and recorded in the office of the Recorder of St. Louis County aforesaid, in Book 472, page 95, bounded and described as follows, to-wit: A strip of land fifty (50) feet in width, twenty-five (25) on each side of a central line, beginning thirty-one hundred feet (3100) west of the west line of Union avenue, at a point in the dividing line between the lands of the said Kingsbury estate and of Robert Forsyth, and running northwestwardly at a tangent to a dividing line heretofore existing between the said Kingsbury estate and the land of Robert Forsyth, the said curve having its center to the north thereof, and a radius of twenty hundred and twenty-two (2022) feet, the length of said curve being eleven hundred and sixty-two (1162) feet, thence the said central line runs straight on a course north 42½° west for a distance of twelve hundred and thirty-nine (1239) feet to a point on the dividing line between said Kingsbury estate and the Deaver estate; all of which said pieces of land hereby conveyed are laid down, designated and colored blue upon a map hereto attached and made a part hereof marked "Chart A." And also the said party of the first part hath conveyed, assigned and transferred, and by these presents doth convey, assign and transfer unto the said party of the second part and to its successors and assigns an undivided one-half of all the right, title or interest of the party of the first part, of, in, or to the right of way, and of, in, or to any and all other rights, privileges and franchises, powers and immunities owned by or vested in or enjoyed by or that may hereafter be acquired and owned by, vested in or enjoyed by the party of the first part, in, through or upon Forest Park, by any means or from any source whatever. All of which conveyances of the said rights of way in this deed mentioned are made subject to the terms and conditions upon which the same were granted to the party of the first part. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title and interest, property, possession, claim and demand whatsoever, as well
394 in law as in equity of the said party of the first part, in and to the same and every part and parcel thereof with the appurtenances. To have and to hold all the right, title, interest, claim and demand whatsoever of the said party of the first part of, in, and to the above conveyed, assigned and described premises with the appurtenances unto the said party of the second part and its successors and assigns to its and their

own proper use, benefit and behoof forever. And the party of the first part doth hereby for itself, its successors and assigns covenant to warrant and defend the premises and every part thereof unto the party of the second part, its successors and assigns, against the lawful claims of every person whomsoever.

In witness whereof, the party of the first part by its president, hereunto duly authorized by a vote of its directors and stockholders, and under its corporate seal, attested by its secretary, hath formally executed these presents, this, the day and year first above written.

THE ST. LOUIS COUNTY RAILROAD COMPANY,
By Joseph Brown, President.
Attest: H. R. Driggs, Secretary.

Copy of Seal.
The Saint Louis County
Railroad Company, Missouri.

State of Missouri,
County of St. Louis—ss.

Be it remembered that on this eleventh day of August, A. D. 1875, before me the undersigned, a Notary Public, duly commissioned April 10th, 1874, commission expires April 6th, 1878, within and for the County and State aforesaid, personally appeared Joseph H. Brown, President, and H. R. Driggs, Secretary, of the St. Louis County Railroad Company, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing as President and Secretary of the St. Louis County Railroad Company, party thereto, and who affixed thereto the Seal of said Corporation and severally acknowledged that they executed and delivered the same as the act and deed of said Corporation for the purpose therein contained.

Witness my hand and official seal the day and year first above mentioned.

LYNE S. BROTHERTON,
Notary Public, St. Louis, Mo.

Copy of Seal.
Lyne S. Brotherton,
Notary Public,
St. Louis County, Mo.

395 Chart "A."

Referred to in Deed of St. Louis County Railroad Co. to the St. Louis, Kansas City and Northern Railway Co., dated August 11th, 1875.

Plats attached to this deed were filed with transcript to Ct. of Appeals.

Filed and recorded Aug. 13th, 9:05 A. M., 1875.

D. H. MAC ADAMS, Recorder.

Note.—The letters "ea" of the word "eastern" in 4th line, page 328, of this record, are written over an erasure, and the words and figures "duly commissioned April 10th, 1874, commission expires April 6th, 1879," in 30th and 31st and the word "first" in 37th line, page 330, of this record, are interlined in the original deed.

State of Missouri,
City of St. Louis—ss.

I, the undersigned Recorder of Deeds of said City, certify the foregoing to be a true copy of an instrument in writing executed by the St. Louis County Railroad Company to the St. Louis, Kansas City and Northern Railway Company, together with the Certificate of acknowledged and annexed Plats, and date of filing and Recording thereof, as the same remains of record in my office in Book No. 526, page 324, and following.

Witness my hand and official seal this, the seventeenth day of December in the year of our Lord, one thousand eight hundred and eighty-three.

(Seal) THOS. F. FARRELLY, Recorder.

396 Exhibit D.

The Sterling and Webster Abstract Co.
Examiners of Land Titles.
No. 615 Chestnut Street, St. Louis, Mo.
B. F. Webster, Pres't. Thos. R. Reynolds, Sec'y.
F. G. Flanagan, Treasr.

St. Louis, Mo., July ...., 1886.

John C. Orrick, Esq.—Sir: We have examined the records of the City of St. Louis and annex hereto an Abstract of all conveyances of record affecting the title to the Rail Road from the date of the deed of trust by the St. Louis County Rail Road Company October 9, 1875, recorded Book 529, page 332 to the date of the deed to the St. Louis, Kansas City and Northern Railway Company, recorded Book 608, page 45.

(Seal) THE STERLING & WEBSTER ABSTRACT COMPANY,

By B. F. Webster, President.

Attest: Thos. R. Reynolds, Secretary.

St. Louis County Rail Road Company, a corporation duly incorporated under the General Statutes of Missouri, &c.

To

Rufus J. Lackland and Gerard B. Allen, as Trustees.

Deed of trust, dated October 1, 1875. Recorded October 9, 1875, in Book 529 page 332. Acknowledged at St. Louis County, Missouri, October 1, 1875, before Robert M. Foster, Notary Public, by Joseph Brown, President, and H. R. Diggs, Secretary, of St. Louis County Rail Road Company, and before same officer October 1, 1875, by Lackland and Allen.

Whereas the General Statutes of Missouri, under which said company is incorporated, provides that "every corporation as such has power to hold, mortgage, or otherwise convey such Real and Personal Estate as the purposes of the corporation shall require," and that every corporation formed under said General Statutes relative to Rail Road companies, shall have power "from time to time to borrow such sums of money
397 as may be necessary for completing, finishing or operating their Rail Road, and to issue and dispose of the bonds for any amount so borrowed, and to mortgage their corporate property and franchise, to secure the payment of any debts contracted by the Company for the purposes aforesaid."

Whereas at a meeting of the Board of Directors of said Company, at its office in the City of St. Louis, August 11, 1875, it was Resolved:

That for the purposes of this Company there be issued the bonds of the Company to amount of $300,000.00 of the denomination of $1,000.00 each, to run for 30 years with coupons attached for interest at 7 per cent. payable semi-annually in New York or St. Louis, principal and interest payable in gold, and that a mortgage to secure such bonds and interest be made upon the Railroad of this Company and its property and franchises after the conveyance shall be made to the St. Louis, Kansas City & Northern Railway Company to secure the payment of the bonds to be so issued and interest thereon and that the President and Secretary of the Company duly execute and attest said bonds and mortgage with the seal of the Company and acknowledge and record said mortgage.

That said Company pursuant to aforesaid resolution of Directors issued bonds to the number of 300 and denomination of $1,000.00, each numbered consecutively from 1 to 300, of date even with this indenture, principal and interest being payable in the City of New York, or in the City of St. Louis at the Agency of said Company in gold, &c., on the 1st of October, 1895, and the interest thereon at the rate of 7 per cent.,

payable in gold at New York or St. Louis on first days of April and October, &c. Bonds to be executed under seal of first party, signed by President and attested by Secretary, &c., &c., and countersigned by Trustees, &c., and sets forth form of Bond, and Coupon, and Certificate by Trustee.

Now, therefore, St. Louis County Railroad Company party of first part by virtue of the power granted by Statute, &c., and for the purpose of securing the payment of principal and interest of said 300 bonds, &c., and $1.00 grants, bargains and sells unto said Lackland and Allen, as trustees and survivor, &c., and successor "all and singular its line of railroad 20 miles in length extending westwardly from the Union Depot in the City of St. Louis at Tayon Avenue, parallel to the Pacific Rail Road of Missouri to Grand Avenue, thence through Forest Park and Union Avenue, and thence to Creve Coeur Creek, through the County of St. Louis in the State of Missouri, together with all the right of way, depots, stations, railways, rails, ties,
switches, machine shops, rolling stock, locomotives, cars,
398 water tanks, machinery right, interest and franchise
of the said Company party of first part now owned, possessed or acquired or hereafter owned, possessed or acquired on the aforesaid 20 miles of said Company's line of road, and all the appurtenances to the above described corporate property and franchises belonging or in any wise appertaining."

To hold same to said Trustee and survivor.

Provided, &c., that if said Company pay, &c., said bonds or the portion thereof that may be duly issued, &c., said principal and interest then this deed shall be satisfied. But if failure be made in payment of interest or any of said bonds for 6 months after same becomes due, &c., and after demand made at the places hereinbefore designated, &c., then second parties and survivors, successors or successor in this trust are authorized and required upon the written request of the holder or holders of 20 per cent. of said bonds in arrear and unpaid to offer the said railroad with all its property and interests, rights and franchises herein conveyed, and to sell the same at public vendue to the highest bidder for cash at Court House door, City of St. Louis—ninety days notice, &c., by notice published weekly or oftener in at least one paper published in each of the cities of St. Louis, New York, Philadelphia and Boston, and upon such sale said trustees, &c., shall have power, and this power shall be irrevocable to make, execute and deliver any conveyance or conveyances that may be necessary to completely transfer and convey all the above described property and all and every interest, right or title of any kind or character which said railroad may have in said premises, &c., to pur-

chaser, &c., who may immediately enter upon and take possession of said premises, effects and franchises and all benefit and equity of redemption therein of said Company shall be forever barred and provides for payment of securities out of funds after sale.

In witness whereof, St. Louis County Railroad Company has caused its corporate seal to be hereto affixed, and these presents to be subscribed by its President and Secretary, &c., and mortgagees have signed as acceptance.

(Corporate Seal)
THE ST. LOUIS COUNTY RAILROAD COMPANY,
By Joseph Brown, President.
(Seal) RUFUS J. LACKLAND, Trustee,
(Seal) GERARD B. ALLEN, Trustee.

399 St. Louis County Railroad Company, a corporation, &c., by Trustees
To
Charles Miller.

Deed by Trustees, dated June, 8, 1877. Recorded June 8, 1877, in Book 569, page 459. Acknowledged at St. Louis County, Missouri, June 8, 1877, before C. D. Greene, Jr., Notary Public.

Sets forth deed of trust October 1, 1875, Book 529, page 332 to secure certain bonds, &c. That said Company did fail to pay, &c., the interest on said bonds secured by said Deed of Trust for six months after same became due, &c., and after demand made, &c., at places designated and thereupon undersigned Trustees in pursuance to authority, &c., in said Deed of Trust given, did upon the written request of the holders of more than 20 per cent. of said bonds in arrear and unpaid proceed to offer the railroad of said Company with all its property and interests, rights and franchises by the said Deed of Trust conveyed and hereinafter more fully described and to sell the same at public vendue to highest bidder for cash at east front door Court House in St. Louis on Saturday, May 26, 1877, first having given 90 days notice thereof, &c., weekly in one paper published in each of the Cities of St. Louis, New York, Philadelphia and Boston, copies of which advertisement with proof of publication attached and at such sale Charles Miller being highest and best bidder at $12,000.00, the said mortgaged premises and franchises were struck off and sold to him. Now, therefore, convey. Same description as in Deed of Trust. Hands and seals.

(Seal) RUFUS J. LACKLAND,
(Seal) GERARD B. ALLEN.

Copy of Trustee's Sale—Sets for the Deed of Trust 529, page 332, describes property as in deed, sale for cash at hand at east front door of Court House in St. Louis, Missouri, Saturday, May 26, 1877, between 9 and 5.

Proof of publication of above in St. Louis Dispatch, St. Louis 14 times, first insertion February 23, 1877, and last May 23, 1877.

Proof publication in Boston Daily Globe on the 19th-26 Feb., March 5, 12, 20, 26, April 2, 9, 16, 23, 30, May 7, 14 and 21.

Proof publication in New York in New York Daily Witness —once a week for 14 successive weeks commencing February 24, 1877 , and ending May, 25, 1877.

This proof is taken before A. H. Bradley, Notary Public, New York. And the fact that he is a Notary
400 is proven by Clerk of City and County of New York by certificate to that effect.

Proof of publication in Philadelphia Inquirer 14 times, once each week commencing February 20, and ending May 22, 1877, inclusive.

Charles Miller and wife, Ellen M. Miller,
To
St. Louis & Missouri River Rail Road Company, a corporation.

Quit-Claim Deed, dated June 8, 1877. Consid. $87,500.00. Recorded June 8, 1877, Book 568, page 426. Acknowledged at St. Louis County, Missouri, June 7, 1877, before J. R. Triplett, Notary Public.

Bargain, sell, convey and confirm unto second party and its successors and assigns, all that portion of the property and franchises of the St. Louis County Rail Road Company, 6 miles in length, extending westward from the Union Depot in the City of St. Louis at Tayon Avenue, parallel to the Pacific Rail Road of Missouri to Grand Avenue, thence through Forest Park and Union Avenue, and thence by Forsyth Junction to the intersection of the Olive Street Road with the Old Bonhomme Road in the City of St. Louis, Missouri, together with all the right of way, rights, interests and franchises on the aforesaid six miles of said Company's line of road and all appurtenances to the above described corporate property and franchises belonging or in any way appertaining. (It being a portion of the property and franchises which the St. Louis County Rail Road Company by Lackland and Allen, Trustees, granted and conveyed unto said party of first part by deed of even date herewith and intended to be forthwith recorded.)

Hands and seals,

(Seal) CHARLES MILLER,
(Seal) ELLEN M. MILLER.

The St. Louis & Missouri River Rail Road Company, a corporation,
To
Joseph A. J. Aderton, Trustee for Charles Miller.

Deed of Trust, dated June 8, 1877. Recorded June 8, 1877, in Book 572, page 345. Acknowledged at St. Louis, City and County, Missouri, June 8, 1877, before Valle F. Reyburn, Notary Public, by James O. Broadhead, President, and Joseph Shippen, Secretary.

Conveys all and singular, the property both real and personal and franchises of said party of first part consisting of all that portion of the property and franchises late of the St. Louis County Rail Road Company, six miles in length, ex-
401 tending westwardly from the Union Depot in the City of St. Louis, at Tayon Avenue parallel to Pacific Rail Road of Missouri to Grand Avenue, and thence through Forest Park and Union Avenue, and thence by Forsyth Junction to the intersection of the Olive Street Road with the old Bonhomme Road in the City of St. Louis, Missouri, together with all the right of way, interest and franchises owned, possessed and acquired on the aforesaid 6 miles of said road and all appurtenances to the above described corporate property and franchises belonging or in any wise appertaining (being the same property and franchises that said first party acquired from Charles Miller by deed bearing even date herewith and intended to be forthwith recorded.

In trust to secure 25 notes of even date numbered from 1 to 25, each for $500.00, payable on or before the first of December, 1877, at Valley National Bank, 8 per cent. interest from June 1, 1877.

ST. LOUIS & MISSOURI RIVER RAIL ROAD COMPANY,
By James O. Broadhead, President.
Countersigned by Joseph Shippen, Secretary.

No.....with an impress of the corporate seal.

In case of default sale of said property at public vendue to highest bidder at the east front door at Court House, St. Louis City for cash—30 days public notice and on such sale shall execute deed in fee to purchaser. Testimony--the St. Louis & Missouri River Rail Road Company by order of the Board of Directors has hereunto affixed its corporate seal and caused the same to be signed by its President, and countersigned by

its Secretary and second party has hereto set his hand and seal.

ST. LOUIS & MISSOURI RIVER RAIL ROAD COMPANY,

By James O. Broadhead, President.

(Corporate Seal)

Countersigned by Joseph Shippen, Secretary.

St. Louis & Missouri River Railroad Company, by Trustee,

To

Herman A. Haeussler.

Deed by Trustee, dated February 11, 1878. Recorded February 14, 1878, in Book 589, page 158. Acknowledged at City of St. Louis, Missouri, February 13, 1878, before H. G. Sachleben, Notary Public of City of St. Louis.

Recites foregoing Deed of Trust, all of said notes due and unpaid, request of legal holder of 14 of said notes, and trustee acting in pursuance of provisions of said deed of trust
402 and having given over 30 days public notice by advertisement in Missouri Republican, copy advertisement and proof attached, did proceed to sell the property hereinafter described at public vendue to highest bidder at east front door of Court House, City of St. Louis, for cash, on 11th of February, 1878, between 10 and 5, when and where the same was struck off to said Haeussler, &c., at $12,500.00.

Now, therefore, convey "all and singular the property, both real and personal, and franchises of first party, consisting of all that portion of the property and franchises late of the St. Louis County Railroad, 6 miles in length," &c., &c., acquired by said St. Louis and Missouri River Railroad from Charles Miller. Hand and Seal,

(Seal) J. A. J. ADERTON.

Copy of advertisement attached—Sets forth Deed of Trust 572, page 345, and property therein described, sale February 11, 1878, between 10 and 5, east front door of Court House, City of St. Louis, for cash.

Proof of publication in Missouri Republican, 34 times from January 9 to February 11, 1878.

St. Louis County Railroad Company, by Sheriff of St. Louis in execution.

To

Herman A. Haeussler.

Deed by Sheriff, dated December 5, 1878. Consid. $191.00. Recorded Book 605, page 167. Acknowledged in open Circuit Court, at City of St. Louis, December term, 1878, Thursday, December 5, 1878.

Recites that on the 15th October, 1877, two judgments were rendered in the Circuit Court, City of St. Louis, one in favor of James O. Broadhead and both against said St. Louis County Railroad Company, the one in favor of E. Harrison being for $23,347.86 and costs, and Broadhead for $7,261.63 debts and costs. Upon which judgments two executions were issued from Clerk's office, one in favor of Harrison, November 7, 1878, and the other in favor of Broadhead against said St. Louis County Railroad Company, November 6, 1878, &c. Levy November 11, 1878, on all right, &c., and property of said company in and to the following described real estate in City of St. Louis, Missouri:

1. A parcel of land beginning in the West line of Tayon Avenue, 153 feet 5 inches South of Randolph Street; thence running West in a direct line 1,178 feet 7 inches more or less to a point in the East line of Mercer Street, which is 182 ft., 6 in. south of Randolph Street; thence south on east line of Mercer Street to a point; thence East along North line
403 of St. Louis, Kansas City and Northern Railway to Tayon Avenue, and thence North to beginning; and being in Blocks 457 S., 1690 and 1674.

2. Lots 7, 8, 14, 15, 17, 18, 19, 20 and 21, Block 1704.

3. A parcel of land in Block 2272, bounded North by Half Street, East by a point and West by a line 60 feet East of and parallel to High Street.

4. Lots 14, 15, 16 and 17, Block 1707.

5. Parcel of land in Block 2280, bounded East by a point, North by Gratiot Street, and West by Jefferson Avenue.

6. Parcel of land in Blocks 2257 and 2252, bounded East by Jefferson Avenue, North by Cooper Street, West by line parallel to and 138 ft., 6 in. East of Summit Avenue.

7. Lots 1, 2, 3 and 12, Block 2549, North.

8. Lots 1, 2, 3, 4, 5, 6 and 7, and Lot 16, Block 2236.

9. Parcel of land in Block 2217, 157 feet on Theresa Avenue, and of that width running East to West line Rankin Avenue, and bounded North by land of Taylor.

All of above nine parcels of land are bounded South by right of way of St. Louis, Kansas City & Northern Railway Company.

10. All that part of a seven acre parcel of land between Cabanne Street, Vandeventer Avenue and the Northern pro-

jected line of Laurel Street, and the lands of Brooks and Neuer acquired by defendant of Pacific Railroad by Deed 463, Page 509.

11. Part of Lots 4 and 5 of Subdivision, of Lot 74th Series, Chouteau Mill Tract, 60 feet wide by 449 feet deep on North line, bounded North by line 145 feet North of North line of Laurel Street if continued, and by land of Thomas Brooks, the Southwest corner being 194 feet South of Manchester Road.

12. A strip of ground 45 feet more or less in width, and running from Vandeventer Avenue to Kingshighway, and the South part of which is now used by St. Louis, Kansas City and Northern Railway Company as their right of way, said parcels being in Surveys 1657 and 1332, Musick's Addition.

13. All the Real Estate or right of way over Real Estate, or rights to use any property ever acquired or owned by said St. Louis County Railroad Company not embraced in foregoing description, as well as its rights and franchises not heretofore conveyed by it, the St. Louis, Kansas City & Northern Railroad Company, and having previously to day of
404 sale, etc., given at least twenty days notice of the time and place of sale, and of Real Estate to be sold, etc., as the law directs by advertisement in the St. Louis Times and St. Louis Times-Journal in English Language, and in Amerika in the German Language, two daily newspapers printed in St. Louis by virtue, etc., did on December 5th, 1878, between 9 and 5, at East front door of Court House, during December term Circuit Court, at the City of St. Louis, 1878, expose for sale at Public Auction all interests and estate and property of said St. Louis County Railroad Company, of in and to the above described Real Estate, together with all rights, etc., and said Haeussler being highest bidder for:

First—Described Real Estate in Block 475 S., 1690 and 1674, at $50.00.
Second—At $1.00 each Lot.
Third—At $5.00.
Fourth—$1.00 each Lot.
Fifth—Block 2260, $1.00.
Sixth—Block 2257 and 2252, at $1.00.
Seventh—At $1.00 each Lot.
Eighth—At $1.00 each Lot, Block 2236.
Ninth—At $25.00, land in Block 2217.
Tenth—At $5.00.
Eleventh—$5.00 both lots.
Twelfth—$5.00.

And $50.00 for lastly described Real Estate and property. In all, $191.00, same struck off and sold to said Haeussler.

Now therefore convey, &c.,

Witness, John Finn, Sheriff of the County of St. Louis. Hand and seal,

(Seal) JOHN FINN, Sheriff.

405 Herman A. Haeussler, and Wife, Emilie Haeussler,
To
George S. Grover.

Quit Claim Deed, dated December 23, 1878. Consid. $1.00. Recorded December 24, 1878, in Book 603, Page 144.

Acknowledged at City of St. Louis, Missouri, December 23, 1878, before H. G. Sachleben, Notary Public.

A part of seven acre piece of land belonging to Missouri Pacific Railroad, situated between Cabanne and Vandeventer Avenues, and other property, it being the intention of the party of the first part to convey to the party of the second part, by this deed, all and every part and parcel of the Real Estate conveyed to party of first part, by J. A. J. Aderton, trustee, by deed of February 11, 1878, Book 589, Page 58, and also all the parcels of Real Estate conveyed to said party, by Sheriff of St. Louis City, December 5, 1878, and filed for record in the Recorder's office of said City, December 7, 1878, which have not been by Warranty Deed, already conveyed to second party, and if any tracts or parcels of land conveyed to the party of the first part aforesaid by the deeds aforesaid are not herein specifically described, they are nevertheless hereby conveyed to party of second part.

Hands and seals,

(Seal) HERMAN A. HAEUSSLER.
(Seal) EMILIE HAEUSSLER.

No part of the land in question was conveyed by Haeussler prior to above deeds.

George S. Grover, and Wife, Maggie C. Grover,
To
Wells H. Blodgett.

Deed of Trust, dated December 24, 1878. Recorded, December 24, 1878, in Book 605, page 238.

Grant, bargain and sell land in St. Louis, Missouri, Lots 7, 8, 14, 15, 17, 18, 19, 20, 21 City Block 1704 bounded South by right of way of St. Louis, Kansas City & Northern Railroad,

and partially on the East by Mercer Street, North by Scott Avenue, and West by Neome Street.

All that portion of Block 2272, bounded South and East by St. Louis, Kansas City & Northern Railroad, North by Half Street, West by line 60 feet East of and parallel with East line of High Street.

406 All parcel of land embraced in lots 14, 15, 16 and 17, Block 1707, bounded North by line 50 feet from and parallel to North line of right of way of Missouri Pacific Railroad, South by North boundary line of right of way of St. Louis, Kansas City & Northern Railway, West by Lot 18, in Block 1707, and on East by High Street.

All parcel of land in Block 2260, bounded South and East by right of way of St. Louis, Kansas City & Northern Railroad, North by Gratiot or Cooper Street, and West by Jefferson Avenue.

All that parcel of land Blocks 2257 and 2252, bounded South by right of way of St. Louis, Kansas City & Northern Railroad, East by Jefferson Avenue, North by Cooper Street, West by line 138 ft., 6in., East of and parallel to East line of Summit Avenue.

All that portion of Lots 1 and 2 and 3 and 12, Block 2549, not previously conveyed to St. Louis, Kansas City and Northern Railway, by St. Louis County Railroad Company, book 526, page 324.

All that portion of Lots 1, 2, 3, 4, 5, 6, 7 and 16, Block 2236 not previously conveyed to St. Louis, Kansas City and Northern Railroad, and book 526, page 324.

All that parcel of land in Block 2217, between Ranken Avenue and Theresa Avenue, 157 feet North of North line of right of way of Missouri Pacific Railroad, as follows:

All that parcel of land in Block 2,217, between Ranken Avenue and Theresa Avenue, beginning in the West line of Ranken Avenue, 157 feet North of the North line of the right of way of the Missouri Pacific Railroad; thence West parallel to said right of way 425 feet to East line of Theresa Avenue; thence South on Theresa Avenue 127 feet; thence East on North line of right of way of St. Louis, Kansas City and Northern Railroad to West line of Ranken Avenue and thence North on West line to beginning.

Part of a seven acre piece of land belonging to Missouri Pacific Railroad, situated between Cabanne and Vandeventer Avenues, beginning at the Northeast corner of said piece in the

middle of Mill Creek; thence South parallel to Cabanne Street, 140 feet along land of William G. Webb; thence West in continuation and projection of North line of Laurel Street, 425 feet along the remaining land of the Missouri Pacific Railroad; thence North and parallel to Vandeventer Avenue, 135 feet along the land of Thomas Brook to Southwest corner of said 7 acre tract; thence East parallel with South line as hereinbefore described, 201 feet to point middle Mill Creek; thence East to center of said Creek along the lines of said Thomas Brooks and E. Neuer to beginning, except such portions of such tract heretofore conveyed by St. Louis County Railroad Company to St. Louis, Kansas City and Northern Railroad, Book 526, page 324.

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Part of lots 4 and 5 of sub-lot 7 4th series, Chouteau Mill Tract, beginning 55 feet North of intersection of Laurel Street, produced to East line of land of Brooks, thence in Northwest course 236 feet to point on the West line of Brooks about 194 feet South of the South line of Manchester Road; thence North along said West line 90 feet to a point; thence Southeast parallel to said Northwest course 449 feet to Southeast corner of land of Brooks, adjoining Southwest corner of land of E. Neuer; thence West and parallel to prolonged line of Laurel Street 213 feet to Northwest corner of land formerly belonging to Missouri Pacific Railroad; thence South about 76 feet 6 inches to beginning, except such portions conveyed, Book 526, page 324.

Part of survey 1657 containing 44-100ths acres more or less, beginning in the North line of said survey at the Northwest corner of Musick's Addition; thence West along the North line of said survey 429 feet, more or less to property of L. A. Labeaume; thence South along his East line 45 feet to a point; thence East parallel to North line of said survey 45 feet South of same 429 feet more or less to West line Musick's Addition; thence North along said West line 45 feet to the beginning, bounded North by the North line of said survey, East by West line Musick's Addition South by Ghio and West by Labeaume, being 45 feet in width off the North side of land acquired by Ghio from Mumford, January 24, 1868.

Piece land same survey 1657, Section 7, 45 West of R. 7. E. in St. Louis County having a length from East to West of 435 feet 3 inches more or less, and a width from North to South of 45 feet bounded North by North line of said survey, East by line parallel to and 429 feet more or less West of West line of Musick's Addition, South by a line parallel with and 45 feet South of said North line of survey and being a strip 45 feet in width of the entire Northern end of tract of land in St. Louis owned by L. A. Labeaume.

A rectangular strip of land in the 13th Ward in survey 1332 bounded North by remaining portion of the whole piece belonging to John M. Harney fronting on south side of Bates Avenue, East by Boyce, South by McCune and Dougherty and West by De Thury, said strip being 309 feet long from East to West by 25 feet in depth.

408 All that rectangular strip in 13th Ward, City of St. Louis, South part of larger piece belonging to Christian De Thury, bounded North by remainder of said larger piece (which is bounded North by Bates Avenue), East by Harney, South by McCune and Dougherty, West by De Noue, being 250 feet long from East to West and 25 feet in depth.

Strip of land 25 feet in width along South boundary line of Octavia Boyce on Bates Avenue, between Kings Highway and Vandeventer Avenue.

Strip of land 25 feet wide, extending from Northwest corner of land of McCune and Dougherty, North 81 degrees, West along North line of said McCune's land a distance of 77 feet; thence on a strip 40 feet wide embraced in parallel lines equally distant from a center line, beginning at the Northwest corner of above described strip and running West by a course bearing Southward having a radius of 2,365 feet for a distance of 400 feet; thence by a straight line South 89 degrees 10 minutes, West for a distance of 135 feet; thence by a curve Northward, having a radius of 1,287 feet, a distance of 395 feet and thence by a straight line North 73 degrees 50 minutes, West for a distance of 210 feet to Kings Highway upon lands situated on Kings Highway, between Bates Avenue and Clayton Road, a strip of land 25 feet wide along the entire South boundary of Helen J. Clemens' land situated on Bates Avenue, joining the property of Julia J. Thomas on the West.

A strip of land 40 feet wide over and across Cabanne's Dairy Farm, the center line which begins at Kings Highway 20 feet North of the Southeast corner of said land and running along parallel to South line thereof 825 feet; thence by a curve 1,170 feet long, bearing Northwest with a radius of 1,903 feet, thence by a line bearing North 55 degrees, West about 1,090 feet to Union Avenue, not less than 487 feet South of Northeast corner of R. Forsyth's land.

A strip of land 40 feet wide over and upon the lands of R. Forsyth in Central Township, St. Louis County, beginning on Union Avenue by and upon a strip of land 40 feet wide equally divided, 20 feet on each side of a central line 480 feet South of Northeast corner of said land; thence Northwest to the line between J. W. Kingsbury and R. Forsyth, about 1,055 feet

West of Union Avenue; thence on a strip 30 feet in width along the North line of said land due West to point about 978 feet West of Skinker Road.

Strip 40 feet in width across the Northwest corner of said Forsyth's land center line of which beginning 1,578 feet
409 East of Northwest corner of said land running in a Southwest direction to point 243 feet North of Southwest Corner of said R. Forsyth's land.

All that strip of land in the City of St. Louis, 30 feet wide, commencing about 1,055 feet West of Union Avenue and running West along South boundary of said property hereinbefore described across the Skinker Road to a point between Skinker Road and the water course, which said water course crosses the dividing line between the lands of Kingsbury and Forsyth about 800 feet West of said Skinker Road and from said point between said Skinker Road and water course a strip of land 40 feet wide with sufficient land for the slopes of the cut and fills in the construction of a railroad across said water course; thence between said water course and the dividing line between said estate of Kingsbury and Forsyth land to Northwest corner of Prouhet's land, said water course being crossed again by said strip near the Northeast corner of said Prouhet's land and thence by a strip 30 feet wide along South boundary line of said James W. Kingsbury adjacent to land of said Prouhet for a distance of about 2,650 feet.

Part of the estate of James W. Kingsbury, a strip of 30 feet wide, commencing 1,055 feet west of Union Avenue, and running west along South line of said Kingsbury estate across the Skinker road to a point between the said Skinker road and said water course, which water course crosses the dividing line between said estate and the estate of Forsyth, 800 feet West of Skinker road and from said point between Skinker road and water course a strip of land 40 feet wide across said water course and thence between it the said water course and the dividing line between said estate and Forsyth land to Northeast corner of Prouhet's land, said water course is crossed again near the Northeast corner of said Prouhet's land; then a strip of land 30 feet wide along South boundary line of said estate adjacent to the land of Prouhet, a distance of 2,650 feet.

To secure 4 notes of even date.

1 for $12,500.00 at 3 years at Third National Bank.
1 for $1,250.00 at 3 years.
1 for $1,250.00 at 2 years.
1 for $1,250.00 at 1 year.

410 George S. Grover and Wife, Maggie C. Grover,
To
The St. Louis, Kansas City and Northern Railway Company.

December 24, 1878.

Consid. $1.00.

Recorded December 26, 1878, in Book 608, page 45. Acknowledged at the City of St. Louis, Missouri, December 24, 1878, before James P. Williams, Notary Public.

Same land embraced in above deed of trust, it being the intention of the party of the first part to convey to second party of this deed all and every part and parcel of the Real Estate conveyed to first party by Haeussler and wife by deed December 23, 1878, saving and excepting a tract of land conveyed to Edward Walsh, Jr., by first party by deed December 24, 1878.

Special Warranty vs. Grantors.

(Seal) GEO. S. GROVER,
(Seal) MAGGIE C. GROVER.

411 Exhibit E.

In the Circuit Court of the United States, Eastern District of Missouri.

Central Trust Company, of New York, et al., Complainants,
Master's No. 279. vs. In Chancery.
Wabash, St. Louis & Pacific Railway Company, et al., Defendants.

City of St. Louis and the St. Louis, Kansas City & Colorado Railroad Company, Intervenors.

Consolidated Cause.

It is hereby stipulated that said St. Louis, Kansas City & Colorado Railroad Company duly located its line of road in the City of St. Louis on the .... day of May, 1886, and that said line crosses said Wabash, St. Louis & Pacific Railway at Forsyth Junction in said city, thence along and adjoining the north side of the right of way of said Wabash, St. Louis & Pacific Railway to the northern line of Forest Park, in said city, and on the .... day of August, 1886, proceeded to condemn a right of way forty feet wide on said line, were duly filed in the Circuit Court of the city of St. Louis by said St. Louis, Kansas City & Colorado Railroad Company against the owners of the land between Forsyth Junction and the northern line of said park, and such proceedings are now pending.

It is further agreed and stipulated that there shall be deemed and considered in evidence in this cause so much of the record in the principal cause, entitled: "The Central Trust Company of New York et al., vs. the Wabash, St. Louis & Pacific Ry. Co., et al.," as either party may consider relevant to the issue herein.

NOBLE & ORRICK,
Solicitors for Intervenors.
H. S. PRIEST,
For Defendants.

412 Exhibit F.

State of Missouri—ss.

I, Michael K. McGrath, Secretary of State of the State of Missouri, hereby certify that the annexed pages contain a full, true and complete copy of the articles of association of "The Saint Louis County Railroad Company," with the affidavit of three of the directors of said company attached thereto, filed August 25, 1871, as the same appears on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of office of the Secretary of State. Done at the city Jefferson, this nineteenth day of May, A. D. Eighteen Hundred and Eighty-one.

(Seal) MICH'L K. McGRATH,
Secretary of State.

Know all men by these presents. That in order to form an incorporated company for the purpose of constructing, maintaining and operating a railroad for public use in the conveyance of persons and property under the general statutes of the State of Missouri relative to corporations, we, the undersigned subscribers for the stock of said company do make and sign the following:

Articles of Association.

First. The name of the company shall be "The Saint Louis County Railroad Company."

Second. This company shall continue in existence for the term of nine hundred years.

Third. The places from and to which the railroad of this company is to be constructed maintained and operated are as follows, from the city of Saint Louis to some point on Creve Coeur Creek, in the township of Bonnehomme in the county of Saint Louis.

Fourth. The length of the sail railroad is estimated to be sixteen miles, and it is intended to be made and constructed through the county of St. Louis.

Fifth. The amount of the capital stock of this company shall be two hundred thousand dollars, to be divided into two thousand shares of one hundred dollars each.

413 Sixth. The affairs of this company shall be managed by a Board of five directors, whose qualifications, powers and duties shall be as provided by the general statutes of the State of Missouri under which this organization is made, and the code and by-laws that may be adopted by the company.

Seventh. The names and places of residence of the directors who shall manage the affairs of this company for the first year and until others are chosen in their places as follows:

Jonathan Jones, President, Central Tp., St. Louis Co., Mo.
Tho. Skinker, Central Township, St. Louis Co.
Edward Burgess, Central Township, St. Louis, Co.
W. Marsh Kasson, Paterson, New Jersey.
Joseph Shippen, Secretary, St. Louis.

In witness whereof we have hereunto set our hands stating our residence and the number of shares of stock subscribed by each of us respectively this twenty-first day of August in the year of our Lord Eighteen Hundred and Seventy-one.

Names.	Residences.	Shares.
Jonathan Jones,	Central Township,	20.
Edward Burgess.	Central Township,	20.
Joseph Shippen,	St. Louis,	20.
Wm. T. Mason,	St. Louis,	10.
W. Marsh Kasson,	Patterson, N. J.	20.
Tho. Skinker,	Central Township,	20.
Joseph Shippen,	St. Louis,	20.
W. Marsh Kasson,	Paterson, N. J.	20.
Edward Burgess,	St. Louis, Mo.,	20.

State of Missouri,
City of St. Louis.

Edward Burgess, W. M. Kasson and Joseph Shippen three of the above named directors of "the St. Louis County Railroad Company" being duly sworn according to law do say that the amount of stock required by law to wit: the sum of sixteen thousand dollars has been (in good faith), subscribed and five per cent. paid in cash thereon as aforesaid, and that it is intended in good faith to construct, maintain and operate the railroad mentioned in the above articles of association.

EDWARD BURGESS,
W. MARSH KASSON,
JOSEPH SHIPPEN.

414 Sworn and subscribed this twenty-fourth day of August, A. D., 1871, before me.

(Seal) H. D. LAUGHLIN,
Notary Public, St. Louis County, Mo.

Filed August 25, 1871.

EUGENE F. WEIGEL, Sec'y of State.

Certificate of corporate existence issued June 2d, 1873.

EUGENE F. WEIGEL, Sec'y of State.

415 Exhibit G.

U. S. Stamp 50c.
W. D. G.
Nov. 20, 1871.

Whereas, I, W. D. Griswold, am the owner of what is known as the Cabanne Dairy Farm, which I lately bought of John C. Cabanne, know all men by these presents, that I hereby consent that the St. Louis County Railroad Company may locate, construct and maintain its railroad across and over said land on a right of way forty feet in width, the center line of which begins at King's Highway, twenty feet north of the southeast corner of said land and running along parallel to the south line thereof eight hundred and twenty-five feet, thence by a curve eleven hundred and seventy feet long, bearing northwest with a radius nineteen hundred and three feet, thence by a line bearing north fifty-five degrees, west about ten hundred and ninety feet to a point on Union Avenue not less than four hundred and eighty-seven feet south of the northeast corner of Robert Forsyth's land, and the right of way hereby granted to said Railway Company shall be forty feet in width through said land for the location, construction and maintenance of its railroad, and for that use and purpose only. This license to operate in perpetuity of the said St. Louis Railroad Company, its successors and assigns shall continue to maintain and operate their railroad and to cease with their non-use of the same for such purpose, and this agreement is made in consideration of one dollar received from said railroad Company and that its railroad shall be constructed, operated and maintained, and is granted subject to the condition that the same shall be so built, maintained and operated, and also on my demands they shall make good fences along same on each side through the said farm and make proper cattle guards where the same shall enter and leave the same, and further that in building said road they shall make no excavations along the sides of the track for enbankment to deform the surface and be offensive. I consent further that in building the embankment if the forty feet aforesaid

shall not be sufficient to enable the company to complete
416 the same to their satisfaction the toe of such embankment may be run over to my adjoining land without objection, and also if in the cutting for the line of road if necessary they may extend the slope of the cut beyond the limit of the forty feet aforesaid as may be necessary or convenient.

Witness my hand and seal this third day of November, A. D. 1871.

(Seal) W. D. GRISWOLD.

Attest: H. P. Buxton, W. Marsh Kasson.

State of Missouri,
County of St. Louis—ss.

I, J. C. H. Cunningham, a Justice of the Peace in and for said County of St. Louis, do certify that on this twentieth day of November, A. D. 1871, came before me W. Marsh Kasson, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as a witness to the same, and being by me first sworn, saith that he was present and saw W. D. Griswold, who is named in said deed as a party thereto, and whose name is thereto subscribed, execute the same, and heard him acknowledge the same to be his act and deed for the purposes therein mentioned; and that thereupon the said W. Marsh Kasson subscribed his name to said instrument as a witness thereof.

Given under my hand the day and year last above mentioned.

JOHN C. H. CUNNINGHAM,
Justice of the Peace.

Filed and recorded December 5, 1871.

W. C. KENNETT, Recorder.

State of Missouri,
City of St. Louis—ss.

I, the undersigned Recorder of Deeds, certify the foregoing to be a true copy of an instrument of writing executed by W. D. Griswold, together with the acknowledgment and date of filing and recording thereof, as the same appears of record in my office in Book 443, page 96.

Witness my hand and official seal this 16th day of February, 1878.

(Seal) D. H. MAC ADAM, Recorder.

417 Exhibit H.

This Agreement, made this twenty-ninth day of October, A. D. 1872, by and between the Commissioners of Forest Park,

as a body corporate of the City and County of St. Louis and State of Missouri, parties of the first part, and the St. Louis County Rail Road Company of the State aforesaid, party of the second part, Witnesseth: that for and in consideration of One Dollar, to them in hand paid, and of the covenants hereinafter to be performed by the party of the second part, said Forest Park Commissioners hereby grant, and will convey, or cause to be conveyed to said Rail Road Company a free right of way seventy feet wide, through the said Forest Park, according to the blue line on a map accompanying this agreement, being the same designated and agreed upon by John Withnell, Joseph O'Neil and H. W. Leffingwell, on behalf of said Railroad Company. And in consideration of One Dollar, to them in hand paid and of the covenants hereinafter to be performed by the said parties of the first part, said Railroad Company hereby relinquish and shall cause to be conveyed to said Park Commissioners that portion of the right of way heretofore obtained by them from W. D. Griswold, within the limits of the said Park, and it is further mutually covenanted and agreed by and between the parties hereto, as follows, to wit: First, that said Railroad Company shall construct its tracks in a good and substantial manner and shall cover the same with tunnels under East Avenue and under North Avenue, said tunnels shall be so constructed as not to require a rise of over eight feet above the grade, when established, of East and North Avenues, provided that the grade of North Avenue shall not be established below the present surface of the ground where it is crossed by said Railroad—said railroad Company shall also fence and keep fenced that portion of its tracks within the Park, which are not covered by tunnels, in a manner satisfactory to said Park Commissioners, and shall complete all of said tunneling and fencing on or before the first day of January, A. D. 187[illegible]; said Railroad Company further agree to extend their track eastward to Eighteenth Street (Tayon Avenue) within two years from this date.

Second, said Forest Park Commissioners agree to grant
418 to the use of said Railroad Company a space of ground seven hundred feet in length by one hundred feet wide on the line of said Railroad, including the seventy feet already given for the purposes of a passenger Depot within the Park, which said Depot shall be constructed in a style in harmony and keeping of said Park when improved. Third, said Railroad Company shall pay over monthly to said Park Commissioners One Cent on every fare collected on visitors to or from St. Louis and said Park Depot, or One Cent and a half for every round trip ticket to or from St. Louis and said Park Depot. Fourth, and said Park Commissioners agree that out of the amount thus collected and when received by them they

shall pay to said Railroad Company Twenty-Five Thousand Dollars as a consideration for the tunneling and extra grading required by the aforesaid agreement, and the amount that may be received by said Commissioners from the aforesaid payments shall be set apart and paid over quarterly to said Railroad Company, until the whole sum of said Twenty-Five Thousand Dollars is paid. Fifth, said Park Commissioners further agree to exact from all Railroads and other conveyances carrying passengers for hire to or from St. Louis and said Park to whom said Commissioners shall grant any privilege within the Park the same amount required as above specified to be paid by the said St. Louis County Railroad Company. Sixth, it is also further mutually provided and agreed that said Park Commissioners may at any time hereafter cause the grade and route of said road through said Park to be changed at the expense of said Park Commissioners. Provided, however, that said change shall not cause any sharper curves in the line of said Road than those designated by the blue line aforesaid, nor that shall impair the right and privileges hereby granted or lessen the value thereof to said Railroad Company. Seventh, and it is further provided and agreed that said Railroad Company shall from time to time make such regulations as for the running of cars and the railroad operations within said Park as may be necessary and proper for the safety and convenience of passengers and visitors thereto, and the property and privileges hereby granted to said Railroad Company shall be enjoyed in such manner as not to mar, injure or destroy the purposes for which said Park was established. And it is further stipulated, that over and upon the right of way hereinbefore granted, the said Railroad Company shall have the full power and control as to the running of trains, laying tracks and all railroad operations thereon. And said Park Commissioners reserve to themselves the same general jurisdiction for police and park purposes as over the other portions of the Park.

419

In Witness Whereof, The said parties by resolutions of their respective Boards of Directors have caused their respective corporate seals to be hereunto attached and attested by their respective Presidents and Secretaries the day and year first above mentioned.

Forest Seal Park.

LEVIN H. BAKER, President.
CHAS. BLAND SMITH, Secretary.

St. L. Co. Seal R. R. Co.

THE SAINT LOUIS COUNTY RAILROAD COMPANY,
Jonathan Jones, President.
Attest: Joseph Shippen, Secretary.

State of Missouri,
County of St. Louis—ss.

Be it remembered, That on this, fifth day of December, A. D. 1872, before me the undersigned, Notary Public within and for the said county, personally appeared Levin H. Baker, President and Charles Bland Smith, Secretary, of the Commissioners of Forest Park, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing as President and Secretary of the Commisioners of Forest Park, party thereto, and who affixed thereto the seal of said corporation, and severally acknowledged that they executed the same as the act and deed of said corporation, for the purposes therein mentioned, and also personally appeared Jonathan Jones, President, and Joseph Shippen, Secretary, of the St. Louis County Railroad Company, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing as President and Secretary of the St. Louis County Railroad Company, party thereto, and who affixed thereto the seal of said corporation, and severally acknowledged that they executed the same as the act and deed of said corporation for the purposes therein mentioned.

420 Witness my hand and official seal, the day and year above named.

(Seal) THOMAS HUNTINGTON,
Notary Public.

Filed and Recorded Dec. 5th, 3:52 p. m., 1872.

W. C. KENNETT, Recorder.

State of Missouri,
City of St. Louis—ss.

I, the undersigned Recorder of Deeds for said City, certify the foregoing to be a true copy of an instrument of writing executed by the Forest Park Commissioners and the St. Louis County Railroad Company, together with the acknowledgement, date of filing and recording thereof as the same remains on record in my office in Book 464, Page 197.

Witness my hand and official seal, this 30th day of July, A. D. 1886.

(Seal) THOS. F. FARRELLY, Recorder.

Exhibit——

State of Kansas,
Office of Secretary of State.

I, James Smith, Secretary of State, of the State of Kansas, do hereby certify that the following and annexed is a true and

correct copy of the original instrument of writing filed in my office December 20, 1884.

In Testimony Whereof, I have hereunto subscribed my name and affixed my official seal. Done at Topeka, Kansas, this 20th day of December, 1884.

(Seal) JAMES SMITH,
Secretary of State.

By W. T. Cavanaugh, Assistant Secretary of State.

United States of America,
State of Kansas.

Be it remembered, that we, the undersigned, Francis Tiernan and W. Chenawalt and W. H. Stout, citizens and residents of the State of Kansas, and E. R. Stewart, of the State of Ohio, and L. M. Potter, of the State of Ohio, and Robert Popkess, of the State of Kansas, and W. S. McWilliams, of the
421 State of Kansas, do hereby associate ourselves for the purpose of forming a railroad corporation under the laws of the State of Kansas, and now herein set forth the charter of said corporation as follows:

First. The name of the corporation herein and hereby created is and shall be the "St. Louis, Kansas City and Colorado Railroad Company."

Second. The purposes for which this corporation is formed are to construct, maintain, equip, acquire, own and operate a railway or railroad in the State of Kansas, and a telegraph line in connection therewith, commencing at the western line of Seward county, State of Kansas, near the center of said line; thence eastwardly through the counties of Seward, Ford, Comanche, Barber, Harper, Sumner, Cowley, Chautauqua, Elk, Wilson, Neosho, Crawford, Bourbon and Linn, in the State of Kansas, and to a point in the eastern line of said Linn county, near the center of said line and by virtue of the laws of the State of Kansas, and those of the State of Missouri, to construct, maintain, equip, acquire, own and operate said line of railway and telegraph, into and through the State of Missouri, extending eastwardly from said point in the eastern boundary line of Linn county, State of Kansas, through the counties of Vernon, Bates, Henry, Johnson, Cass and Jackson, in the State of Missouri, to the Union Depot, in Kansas City, in said State of Missouri and, furthermore, from the point where the said railroad runs northwestwardly to Kansas City, State of Missouri, eastwardly through the counties Henry, Benton, Morgan, Miller, Cole, Osage, Maries, Gasconade, Franklin, St. Louis, and to and into the city of St. Louis, State of Missouri, to, through, and along by the Union

Depot to the west bank of the Mississippi river, at said city of St. Louis, with all necessary branches, side-tracks, switches, depots and depot grounds and usual conveniences and appurtenances in said Kansas City and the city of St. Louis, and on and along the whole line of the said railroad, and another portion of said railroad commencing in the western line of the county of Chase, at or near the center of said western line; thence eastwardly through the counties of Chase, Lyon, Coffey, Anderson and Linn, in the State of Kansas, to a point in the eastern line of said county of Linn, at or near the center of said line; thence eastwardly into the county of Bates, in the State of Missouri, to the point at or near the same where the said railroad runs eastwardly to said city of St. Louis, and by means of said railroad and appurtenances transport persons and property for compensation and hire, and by said
422 telegraph line to aid in the operation of said railroad and to transmit messages and information for compensation and reward, and this corporation shall have all the rights, powers, privileges, and franchises that may belong or be incident to any railroad corporation created and organized under the laws of Kansas, and also may acquire and hold all the railroad property and franchises which may at any time be obtained by it or conveyed to it by any persons or by any railroad company or other corporation and have the further power to purchase, lease, acquire, construct, maintain and operate any railroad, railway branches, railroad connections or railroad property, or telegraph line or lines which it may at any time have or acquire by the purchase or acquisition of any railroad or telegraph company, franchises or otherwise, and may extend its road and exercise its powers in any other State or Territory authorizing or allowing it so to do, and as by the statutes, law and usage of said other State or Territory it may have the right, privilege or license to do.

Third. The kind of road intended to be constructed is a standard gauge railroad.

Fourth. The estimated length of the railroad is eight hundred and fifty miles.

Fifth. The business of this corporation shall be transacted at its general office, which shall be located at the city of Fort Scott, State of Kansas, and at Kansas City and St. Louis, Missouri, and the city of New York, State of New York.

Its Board of Directors may appoint subordinate stations and places of business as usual for railroad companies.

Sixth. This corporation shall exist for a term of twenty-nine years from the date of the filing of this charter in the office of the Secretary of State of the State of Kansas.

Seventh. The capital stock of this corporation is and shall be twenty million dollars, divided into two hundred thousand shares, each of the par value of one hundred dollars.

Eighth. The number of directors of this corporation shall be seven, and the said Francis Tiernan, W. Chenault, W. H. Stout, E. R. Stewart, L. M. Potter, Robert Popkess and W. S. McWilliams, whose respective places of residence are hereinbefore specified, are hereby appointed the directors of this corporation for the first year.

423 In Witness Whereof, We, the undersigned, being all of the above-named persons, have hereunto set our hands and seals this twentieth day of December, A. D. 1884.

(Seal) FRANCIS TIERNAN,
(Seal) W. CHENAULT,
(Seal) W. H. STOUT,
(Seal) E. R. STEWART,
(Seal) L. M. POTTER,
(Seal) W. S. McWILLIAMS,
(Seal) ROBT. POPKESS.

State of Kansas,
County of Bourbon—ss.

Be it remembered, that on this twentieth day of December, A. D. eighteen hundred and eighty-four, before me, a notary public in and for said county, personally came Francis Tiernan, and Walter Chenault, and W. H. Stout, and E. R. Stewart, and L. M. Potter, and W. S. McWilliams, and Robt. Popkess, to me personally known to be the same persons who executed the above and foregoing instrument of writing, and they severally acknowledged the same to be their voluntary act and deed for the purposes therein mentioned.

In Testimony Whereof, I have hereunto subscribed my name and affixed my official seal the day and year last above written. My term expires December 10th, 1887.

(Seal) JAMES M. STANLEY,
Notary Public.

Exhibit ——

It is stipulated and agreed between the parties hereto as follows:

First. That the several lots or tracts of land indicated in red on Chart "A," and marked "Grover," were obtained by the St. Louis, Kansas City and Northern Ry. Co., through the several conveyances mentioned in the certificate of the "Sterling and Webster Abstract Co.," which certificate is admitted in evidence and marked "Exhibit D."

Second. It is admitted that the several lots and tracts of land now constituting the defendants' right-of-way between Forest Park and the Union Depot not indicated in blue or marked "Grover" on Chart "A'" were obtained by the St. Louis, Kansas City and Northern Ry. Co. from divers persons
424 by purchase and condemnation as stated in defendants' answer, but as to the cost thereof no admissions are intended to be made by the parties.

NOBLE & ORRICK,
Solicitors for Intervenors.
H. S. PRIEST,
For Defendants.

Correspondence.

Wabash, St. Louis and Pacific Railway,
St. Louis, Mo., February 17, 1885.

Messrs. Noble & Orrick, St. Louis:

Gents—In reply to your inquiries in respect to the terms on which the Forest Park and Central R. R. Co. may acquire the use of the Wabash tracks between Forsyth Jct. & Union Depot, I wish to say that we have had some talk concerning the matter with the Receivers, and they do not feel that any arrangement they could make would be binding on the Wabash Co. in case it should resume possession and management of this property, or upon its successor, if there should be a sale of its property under any of its mortgages.

I wish also to state that while we are advised by our attorney that your Co. has not, in his opinion, any right to demand the use of any tracks or property of the Wabash Co. on account of anything contained in the contract of August 11, 1875, between the Commissioners of Forest Park, the St. Louis, Co. R. R. Co. and St. L., K. C. & N. Ry., yet I consider the discussion of that question unnecessary at this time, as I feel satisfied, from the views expressed by the Receivers, that as far as it could be done without prejudice to the interest of the road, that they would be willing to make satisfactory arrangements with you for the use of their track into St. Louis from Forsyth Jct. upon fair and equitable terms. How far these facilities could be granted to you without interfering with the business of our road and what compensation should be allowed for such facilities as we can extend to you is a matter concerning which the Receivers would wish the opinion of Mr. Talmage, the General Manager of the road, and when your people are ready to act I would suggest that they submit their proposition
425 in writing to Mr. Talmage for his consideration and recommendation.

Yours truly,

J. A. McARTHUR,
General Agent.

(Copy.) February 4, 1886.

Messrs. Noble & Orrick, Attorneys at Law, St. Louis, Mo.:

Gentlemen:—We beg leave to acknowledge the receipt of your communication of yesterday, in relation to rates on construction material from Union Depot to Forsyth Junction, quoted by Mr. Talmage to Mr. Drew.

In reply we beg leave to say that the question is one we consider Mr. Talmage quite competent to deal with, and we trust all differences may be amicably adjusted between him and Mr. Drew.

We wish to say, further, however, that so long as we remain in charge of the Wabash property, as Receivers, we shall demand and endeavor to collect from Mr. Drew whatever rate is given him on his material by Mr. Talmage, provided it is within the maximum limit fixed by the statute of the State. Our duty to the creditors of the Wabash Company require this, and we shall, if necessary, apply to the Court for leave to take whatever steps are necessary to protect their rights.

Very respectfully yours,

SOLON HUMPHREYS and THOMAS E. TUTT.
By James F. How, General Agent.

St. Louis, February 5, 188-.

Messrs. Thomas E. Tutt and Solon Humphreys, Receivers of the Wabash, St. Louis & Pacific R. R.—J. F. Howe, Agent.

Gentlemen:—Since the receipt of your reply to ours of the 3d inst., relative to proposed charges for Mr. Drew's freight, we have gone over the figures again, and are now satisfied that Mr. Talmage and ourselves made a mistake in our figuring.

When Mr. Orrick was with Mr. Talmage, Mr. T. figured on the amount per car at the rate given, whatever it was, and he made it $17.90 per car. This was done hurriedly in the office, and we left him supposing that was the amount to be paid per car. We have since made a calculation ourselves, and find that at the rate given ($17.90) per car is incorrect.

426 We figured, say, on 30,000 pounds to a car, at 4-cent rate, would be $12, instead of $17.90, for the railroad iron and lumber. This, as you will see, is much less than $17.90, or a difference of $5.90 per car. We write this in explanation of our former letter, not desiring to do injustice, and correct a mutual mistake.

While we think, under the circumstances, your company could well afford to give Mr. Drew a less rate, we do not question your right to charge the rate authorized by law, provided you charge other parties the same rate.

We have never questioned Mr. Talmage's ability to manage the Wabash property, but suggest that our letter to you was caused by a mistake in his figures given to us in the presence of Mr. Drew, of which I suppose he still has a memorandum.

Yours very truly,

NOBLE & ORRICK,

St. Louis, May 17, 188-.

James F. How, Esq., General Agent Receivers, W., St. L. & P. Ry. Co., City:

Dear Sir:—You may remember that during last year we had some correspondence with you relative to arrangements for the use of the right of way and tracks of your company between Forsyth Junction and Union Depot by the St. Louis, Kansas City & Colorado Railroad Company, and that correspondence closed on February 17, last year, with a letter from you to us on the subject, a copy of which we herewith enclose, in which you state when our people are ready to act that we submit a proposition, &c. Our road is now about completed to Creve Coeur Lake, and we are ready to negotiate for the use of your tracks, &c., between the points named.

Our company is willing to pay to your company a reasonable compensation for what they want, and we suggest that a conference be had at once between the respective parties, with a view of arriving at a basis of an agreement. We have thought it might be well for our engineer, Mr. Emerson, to be present, together with yours, and of course, yourself, and any others you might suggest, to aid to a more perfect understanding of the situation and what was wanted.

Will you please fix a time when we can have such conference, and oblige,

Yours very truly,

NOBLE & ORRICK,

Attys. for St. L., K. C. & C. R. R. Co.

427 (Copy.) St. Louis, May 18, 1886.

Messrs. Noble & Orrick, Attorneys for St. L., K. C. & C. R. R. Co., St. Louis:

Gentlemen:—In reply to your letter of May 17, I will state that as it is the expectation that the reorganized Co. will at no very distant date take possession of this property, we do not feel that we are justified in making other than a temporary agreement with your road for handling its business between St. Louis and Forsyth Jct.

If Col. Emerson, or whoever has the matter in charge for you, will call upon Mr. Talmage, he will be glad to consider with him the terms of such a temporary arrangement.

Yours truly,

JAMES F. HOW, General Agent.

St. Louis, July 2, 188-.

Solon Humphreys, Thomas E. Tutt, Receivers Wabash, St. Louis & Pa. Ry. Co.—Jas. F. Howe, Agent:

Gentlemen:—We have heretofore addressed you two communications in behalf of the St. Louis, Kansas City & Colorado Railroad Company, with a view to come to some understanding with you as to the use of the right of way of the Wabash, St. Louis & Pacific Railway Co. through Forest Park, and up to the terminus of your road in the City of St. Louis, but have been unable as yet to accomplish anything or come to an understanding. We were referred by Mr. How, your agent, to Mr. Talmage, the General Manager of the road, and a conference was had with Mr. Talmage by officers of our company, and they were finally informed by Mr. Talmage that our road under no circumstances could use this right of way upon any terms; that he would not permit us to put our engines on the track or use your right of way with our engines through the park, and to the terminus of your road in the City of St. Louis. We have deemed it advisable to again call your attention to this matter. On the 11th of August, 1875, an agreement was entered into between the Commissioners of Forest Park, the St. Louis County Railroad and the St. Louis, Kansas City & Northern Railway Co. of which latter company the Wabash, St. Louis & Pacific Railway Company is successor and assignee. This contract, in our view, requires your company to permit the St. Louis, Kansas City & Colorado R. R. Co. to use the right
428 of way of the Wabash, St. Louis and Pacific R. R. Co. through Forest Park, up to the terminus of its road into the City of St. Louis, upon such terms and for such fair and equitable compensation, to be paid to it therefor, as may be agreed upon by said companies last named.

We claim that the term "other railroads" gives to our company the right to avail itself of the provisions of this contract as to the use of your right of way, as above stated, under the terms of this tripartite agreement. Our road is now completed to Creve Coeur Lake, and forms a junction with your road at Forsyth, near the park. Having been unable up to this date to come to any agreement for the use of your right of way, as above stated, we have been unable to operate our road. We are suffering great damage and loss every day now, by reason of your failure and refusal to permit our company to use said right of way. We are willing to pay your company a fair and equitable compensation for its use, and we write now to inquire whether you are disposed to recognize our rights as we interpret them under this tripartite agreement, to the use of

said right of way, and to receive from us such fair and just compensation. We await your early reply.

Yours very truly,

NOBLE & ORRICK,
Attys. for St. Louis, Kansas City & Colorado Railroad Co.

(Copy.) St. Louis, July 3, 1886.

Messrs. Noble & Orrick, Attys. for St. L., K. C. & Col. Ry.:

Gentlemen:—Yours of July 2 is received. The Receivers, acting under the advice of their counsel, are not disposed to admit that the St. Louis, Ks. City & Col. R'y has rights under the tripartite agreement of August 11, 1875, as claimed by you.

But as their possession of this property is only temporary, they are willing, as has been repeatedly stated to you, to make a temporary arrangement, which will enable you to handle your business between Forsyth and St. Louis on fair and reasonable terms, until such time as the reorganized company will have possession of the Wabash property, at which time you can negotiate with that company.

During the receivership, however, we will not consent to the running of independent engines or trains over our line through Forest Park and to the Union Depot under the management of any other company.

Yours truly,

JAMES F. HOW, Gen. Agt.

429 In the Circuit Court of the United States, for the Eastern District of Missouri.

Central Trust Company of New York et al., Complainants,
Nos. 2357 and 2464. vs. In Equity.
Wabash, St. Louis & Pacific Railway Company et al., Defendants.

Consolidated cause.

In the matter of the Intervening Petition of the City of St. Louis and the St. Louis, Kansas City & Colorado Railroad Company.

Petition of the Purchasing Committee to be made parties Defendant herein.

Filed December 31st, 1886.

Your petitioners, James F. Joy, Thomas H. Hubbard, Edgar T. Welles and O. D. Ashley, respectfully represent that
430 on the first day of June, A. D. 1880, the said Wabash, St. Louis & Pacific Railway Company, for the purpose of

securing an intended issue of its mortgage bonds to the amount of fifty millions of dollars (to be known as "general mortgage bonds"), and the payment of the principal and interest thereof, duly executed and delivered to the Central Trust Company of New York, and James Cheney of Indiana, as trustees, its mortgage or deed of trust (known as "The General Mortgage"), and thereby conveyed to said trustees, for the purposes in said general mortgage fully set forth, certain lines of railroad and certain interests as the same then existed, or might thereafter exist, in and to certain other lines of railroad, with all the property and franchises, rights, income and choses in action pertaining thereto.

That afterwards, on the 1st day of May, A. D. 1883, for the purpose of securing an intended issue of its bonds (called collateral trust bonds), amounting to ten millions of dollars, said Wabash Company executed and delivered to the Mercantile Trust Company of New York, as trustee, a certain other indenture called and known as "The Collateral Trust," and thereby assigned and transferred to said last named company, for the purposes of said trust, all the bonds, stock, cars, steamboats, rolling stock and interest in real estate, specified in said instrument, and then and there delivered all said bonds, stocks and evidences of title to said trustee.

That petitioners, as trustees and as a "purchasing committee," purchased on the 26th day of April, 1886, certain premises, franchises and property of the said defendant, the Wabash, St. Louis & Pacific Railway Company at a sale made in pursuance of the decree of foreclosure of said General Mortgage and Collateral Trust Mortgage, and sale entered in the above entitled cause on the 6th day of January, 1886.

431 That among the premises, franchises and property so purchased, as aforesaid, was all the right-of-way and railroad of said defendant company extending from the city of St. Louis, in said district, in a northwesterly direction to Kansas City, Missouri, with a lateral extension from Moberly, in the County of Randolph, Missouri, to Ottumwa, in the State of Iowa; and a branch from Salisburry, in the County of Chariton, State of Missouri, to Glasgow, in said State of Missouri.

That the said line of road, prior to consolidation with the said defendant company, was known as the St. Louis Kansas City & Northern Railroad.

That on the 15th day of June, 1886, by decree of this Court, in the above cause, the sale aforesaid to your petitioners, as such trustees, was confirmed.

That on the 21st day of September, 1886, an order was made in the above entitled cause, directing Edmund T. Allen, the Commissioner appointed by the Court to make the aforesaid sale, to execute to your petitioners, as trustees, proper deeds to the property purchased as aforesaid, and also directing proper deeds to the interests in said property by them respectively held, to be executed by said Central Trust Company of New York and James Cheney, trustees, The Mercantile Trust Company, trustee, the said Wabash, St. Louis & Pacific Railway Company and Solon Humphreys and James F. How, trustees.

That your petitioners, as trustees, now own and hold, in pursuance of said sale, decree of confirmation and deeds, an interest in the premises, franchises and property of the said right-of-way and railroad hereinbefore described, and formerly known, as aforesaid, as the St. Louis, Kansas City & Northern Railroad.

432 Petitioners further represent that on the 12th day of July, 1886, the City of St. Louis and the St. Louis, Kansas City & Colorado Railroad Company filed in said cause its petition for intervention, and on the 4th day of August, 1886, their amended petition of intervention, and in said petition and amended petition prayed that a writ of injunction be issued by this Court, restraining said defendant company and Solon Humphreys and Thomas E. Tutt, Receivers, and their agents, from in any manner refusing to permit said petitioning company to use the right-of-way and to run its cars and engines upon and over the tracks upon the right-of-way of the said line of railroad hereinbefore described, as aforesaid, in the said City of St. Louis, between Union Avenue, on the north line of Forest Park, where said tracks enter said park, across said park to Eighteenth street in said city.

That a hearing upon said amended petition and answer of said Central Trust Company and James Cheney, trustees, and said Receivers, was duly had before George H. Shields, Special Master, pro hac vice, and exceptions to the report of said Master filed by said trustees and Receivers; and that final hearing has been had before said Court upon the aforesaid pleadings, proofs taken before said Special Master, report and exceptions thereto, and final decree entered by said Court on the 13th day of December, 1886.

That by said final decree the right of said petitioning company to the use of said right-of-way and tracks thereon is adjudged and granted upon the terms in said decree set forth.

Petitioners further state that as trustees, as aforesaid, they have an interest in said right-of-way and the subject matter of said litigation, and desire to protect and defend said
433 interest by appeal from said final decree to the Supreme Court of the United States.

That petitioners were not made parties defendant to said petition or amended petition of intervention.

Petitioners pray that as trustees, as aforesaid, they may, by order of this Court, be made parties defendant to said petition and amended petition, and that they may be allowed to adopt as their answer the answer aforesaid of said Central Trust Company and James Cheney, trustees, and said Receivers, and the exceptions filed as aforesaid to the report of said Special Master; and that they may be allowed an appeal from said final decree to the Supreme Court of the United States.

And as in duty bound they will ever pray, etc.

JAMES F. JOY,
THOS. H. HUBBARD,
EDGAR T. WELLES,
OSSIAN D. ASHLEY,
Purchasing Committee.
By Wager Swayne, Their Attorney.

435 In the Circuit Court of the United States, for the Eastern District of Missouri.

Central Trust Company of New York et al., Complainants,
Nos. 2357 and 2464. vs. In Equity.
Wabash, St. Louis & Pacific Railway et al., Defendants.

Consolidated Cause.

In re Intervening Petition of the City of St. Louis and St. Louis, Kansas City & Colorado Railroad Company.

Order making Purchasing Committee Parties Defendant herein.

December 31st, 1886.

And now at this day come James F. Joy, Thomas H. Hubbard, Edgar T. Welles and O. D. Ashley, and ask to be made defendants herein and to adopt the pleadings and exceptions hereinbefore filed, in this case, of intervention, as their own, and it appearing to the Court that said James F. Joy,

Thomas H. Hubbard, Edgar T. Welles and O. D. Ashley are the owners, as purchasing committee and trustees, of the premises, right-of-way, and franchises appurtenant
436 thereto, heretofore owned by the Wabash, St. Louis & Pacific Railway, between Union avenue, on the north line of Forest Park, where said railway enters said park, and across said park to Eighteenth street, in the City of St. Louis and over which the intervenor the St. Louis, Kansas City & Colorado Railroad Company are seeking, by their petition of intervention, to obtain the right to run their engines and cars.

It is therefore ordered, that said James F. Joy, Thomas H. Hubbard, Edgar T. Welles and O. D. Ashley, be made parties defendant herein, as purchasing committee and trustees as aforesaid, and that they shall be subject to all orders, judgments and decrees entered or to be entered herein.

And at the time of the presentation of the application of said James F. Joy and others as aforesaid, the intervenors aforesaid objected to the application or that the Court grant the same; and the said objection was at the time overruled, and said order granted notwithstanding.

(Signed) DAVID J. BREWER,
Circuit Judge.

437 In the Circuit Court of the United States, for the Eastern District of Missouri.

September Term, A. D. 1886.

Central Trust Company of New York et al., Complainants,
No. 2357 and 2464. vs. In Equity.
Wabash, St. Louis & Pacific Railway Company et al., Defendants.

Consolidated Cause.

The City of St. Louis, and St. Louis, Kansas City and Colorado Railroad Company, Intervenors.

Final Decree,

December 31st, 1886.

This day came the City of St. Louis, Missouri, and the St. Louis, Kansas City & Colorado Railroad Company, intervenors, herein by their solicitors, John W. Noble and John C. Orrick, Leverett Bell and John P. Ellis, and the defendants against said intervention, the Central Trust Company of New York, and James Cheney (complainants in said consolidated cause),

the Wabash, St. Louis & Pacific Railway Company, de-
438 fendants in said cause, Solon Humphreys and Thomas E. Tutt, Receivers of said latter company, by their solicitors Wager Swayne, Wells H. Blodgett, H. S. Priest and Warwick Hough, and thereupon the cause on said intervention came on to be heard upon the reports (both that on preliminary and that on final hearing) of George H. Shields, Esq., Special Master, pro hac vice, herein only appointed by this Court, and to whom this cause, under previous orders herein, was referred to ascertain and report the facts, as well as his conclusions of the law; and also on the amended bill, answer and replication, exhibits, documents and evidence adduced; said reports bearing date July 24th, and October 4th, 1886, respectively, and also upon exceptions taken to said reports on the part of the said defendants, the Wabash, St. Louis & Pacific Railway Company, Solon Humphreys and Thomas E. Tutt, Receivers thereof, and the Central Trust Company of New York, and James Cheney as Trustees, and it appearing that the said exceptions by consent of parties, are taken as duly filed in this Court, as well as before the said Master, and the said exceptions and said cause having been argued by counsel, and due deliberation had thereon, the Court now orders, adjudges and decrees, that each of said exceptions of said defendants be disallowed and overruled, save and except that part of the Eleventh exception which relates to the basis of compensation for use of right-of-way, and that said part of said Eleventh exception be and is hereby sustained; and the said reports, save and except as aforesaid, are in all things hereby confirmed; and the Court will determine the compensation and the basis therefor, without further reference to the Master.

And the Court doth further find, order, adjudge and decree, that the equities are with said intervenors, and said intervenors are entitled to the relief as prayed for in their amended bill of complaint herein.

439 And the Court finds, adjudges and decrees that the basis of compensation to be paid by the intervenor, the St. Louis, Kansas City & Colorado Railroad Company for the use of the right-of-way and tracks, side-tracks, switches, turn-outs, turn-tables and other terminal facilities of said Wabash, St. Louis & Pacific Railway Company at and between the north line of Forest Park and Eighteenth street in the city of St. Louis, shall be the value of said right-of-way, tracks and other property last described, as determined by the Master in his said reports; and the compensation to be paid shall, be, per annum, six per cent on one-half of the value of said right-of-way, tracks, side-tracks, switches, turn-outs, turn-tables and

other terminal facilities, and the said one-half value is and shall be taken to be $500,000; and that the intervenor, the St. Louis, Kansas City & Colorado Railroad Company, its successors or assigns, pay to said Receivers, Solon Humphreys and Thomas E. Tutt, or their successors in interest, the sum of thirty thousand dollars per annum, in monthly installments of twenty-five hundred dollars each on the 15th day of each month, so long as this decree remains in force, the first monthly installment to become due and payable thirty days after said railroad company, intervenor, shall have connected its tracks with that of the Wabash, St. Louis & Pacific Railway Company at the north line of said Forest Park. All subsequent payments to be made from month to month during the life time of this decree.

And the Court doth further find, adjudge and decree that the expense per annum of maintaining the said right-of-way and other property pending such joint use thereof, including therein all taxes upon said property, shall be borne by the said Wabash, St. Louis & Pacific Railway Company and the said intervenor, the St. Louis, Kansas City & Colorado Railroad Company, in proportion to the number of wheels each of said com-
440 panies shall cause to be passed over the main track or parts thereof on said right-of-way per annum bears to the total number of wheels that both of said companies shall cause to be passed over the same during each year pending the said period of such joint use, and that this expense shall be paid at the expiration of each year. The said right-of-way and tracks thereon and other terminal facilities shall be maintained and kept in good repair by the Wabash, St. Louis & Pacific Railway Company.

And the Court doth further order, adjudge and decree that the running of all trains, engines or cars of said intervenor, the said St. Louis, Kansas City & Colorado Railroad Company, over said right-of-way and tracks, and the use of said right-of-way, road, terminal facilities and other property specified as aforesaid, shall conform to the rules and regulations now in force, and such other reasonable rules and regulations as may hereafter be adopted by the said Wabash, St. Louis & Pacific Railway Company, or its said Receivers, to enable said intervenor to fully enjoy the benefits of this decree, and that the trains of said railroad company, intervenor, shall be so regulated as that at least eight minutes shall if deemed necessary, intervene between its trains and the trains of said Wabash, St. Louis & Pacific Railway Company at any point between said north line of Forest Park and Eighteenth street, and that the sole control and regulation of the running of the trains of

the said companies shall be under this decree in the Wabash, St. Louis & Pacific Railway Company and its Receivers, and subject to the further order of this Court.

And the Court doth further order, adjudge and decree that in all respects, subject to the terms of this decree, the said railroad company, intervenor, shall enjoy the equal use and benefit of said right-of-way, tracks, switches, side-tracks, turn-outs, turn-tables and other terminal facilities with said
441 Wabash, St. Louis & Pacific Railway Company, or its said Receivers, and the said Wabash, St. Louis & Pacific Railway Company, and Solon Humphreys and Thomas E. Tutt as such Receivers, and said Central Trust Company of New York, and James Cheney, and all persons claiming by, through or under them, and each of them respectively, and their agents, servants, counsellors and employees be, and the same are hereby perpetually enjoined and restrained from in any manner refusing to permit the said intervenor, the said St. Louis, Kansas City & Colorado Railroad Company, its successors or assigns, and its or their officers, agents, or employees, from using with it or their engines, cars (loaded or empty), the said right-of-way, tracks, switches, side-tracks, turn-outs, turn-tables and other terminal facilities of said Wabash, St. Louis & Pacific Railway Company between the north line of said Forest Park and said Eighteenth street on the terms hereinabove set forth in this decree in and for the transacting of its or their business and in the operation of its or their road.

And the said intervenor, the St. Louis, Kansas City & Colorado Railroad Company, by its officers, agents and employees and each of them is hereby authorized and permitted with its right-of-way, road, tracks and property, engines and cars, loaded or empty, to make connection with said Wabash, St. Louis & Pacific Railway Company at the north line of said Forest Park, and to use the said right-of-way, tracks, switches, side-tracks, turn-outs, turn-tables and other terminal facilities of said Wabash, St. Louis & Pacific Railway Company, or any one claiming by, through or under it as to the same, between the north line of said park and Eighteenth street on the terms, in the manner and subject to the regulations in this decree set forth, in and for the transaction of the business and in operation of the road of said St. Louis, Kansas City & Colorado Railroad Company, its successors or assigns; and said Solon
442 Humphreys and Thomas E. Tutt, Receivers, and all agents, servants or persons by them engaged or acting with or for them; said Central Trust Company and James Cheney; said Wabash, St. Louis & Pacific Railway Company, and all persons claiming by, through or under said last named company, are hereby restrained and enjoined from in anywise

obstructing, preventing, interfering with or refusing to comply with the permit and privilege hereby ordered adjudged and decreed.

And said Receivers shall by all means in their power aid to fully carry this decree and every part thereof into effect.

And it is further ordered, adjudged and decreed that the intervenors have and recover of the respondents answering herein, their costs and expenses in this proceeding including the Master's compensation, to be herein taxed, and that the Receivers, Solon Humphreys and Thomas E. Tutt, are authorized and directed to pay the same out of any funds now in their hands.

(Signed.) DAVID J. BREWER,
Circuit Judge.

443 In the Circuit Court of the United States, for the Eastern District of Missouri.

Central Trust Company of New York et al., Complainants,
Nos. 2357 and 2464. vs. In Equity.
Wabash, St. Louis and Pacific Railway Company et al., Defendants.

Consolidated cause.

The City of St. Louis, and St. Louis, Kansas City and Colorado Railroad Company, Intervenors.

Opinion. Brewer, C. J.

December 13th, 1886.

The intervenors represent that the Wabash Road is in the possession of Receivers appointed by this Court, and that such road is the owner of a right-of-way passing through Forest Park and then easterly to the Union Depot in the city of St. Louis. They further represent that said road holds said right-of-way subject to use by other railroads upon reasonable terms, and seek through their petition of intervention an order from this Court directing the Receivers to permit the St. Louis, Kansas City and Colorado Railroad Company, one of the petitioners, to run its cars and engines over the tracks of the Wa-
444 bash upon said right-of-way. They base this claim not upon any reserved right in the State to a new exercise of the power of eminent domain, but upon two contracts made on the 11th day of August, 1875. We have therefore no inquiry to make as to the power of the State to condemn a partial use of an existing railroad track in behalf of a new railroad company. No condemnation is here sought; no proffer made of any condemnation money. Neither have we any inquiry as

to the power of the State to compel one railroad company to permit the use of its right-of-way by another. The petitioners rest their claim alone on the contracts, and the question is therefore narrowed to the matter of a contract right. While this may narrow, it does not belittle the question, nor can we be insensible that important rights and interests are involved in the correct solution of this question. We have, on the one hand, the city of St. Louis, a large commercial city, anxious to do everything that it may to further and extend its commercial interests, and urging that a new railroad company may have access to the center of passenger business in the city; and the new company itself, projecting and building a line westward through the State of Missouri, pressing in like manner for such access; and, on the other hand, a large corporation, with extensive lines, which has purchased and paid for a most valuable right-of-way, admitting it to the Union Depot of the city, eager to protect its property interests and to preserve its right-of-way free for its own use; anxious, also, doubtless, to prevent that competition in business which a new road occassions. The parties on both sides are earnest and strenuous, for the interests to be affected by the decision are important. We are fully sensible of this importance, and have given the matter the most careful consideration.

The facts upon which the claims of the petitioners are based, are these:

445 In 1871 the St. Louis County Railroad Company was organized for the purpose of building a narrow gauge road from the city of St. Louis to Creve Coeur, a distance of about sixteen miles. Its proposed route crossed diagonally the northeastern part of what is now Forest Park. That ground at the time belonged to one W. D. Griswold, and from him the same year the railroad obtained a deed to the right-of-way. In 1872 the General Assembly passed an act entitled "An Act to establish Forest Park." By section five of the act the control and government of the park was placed in the hands of a Board of Commissioners; these Commissioners in the fall of 1872 made an agreement with the County Railroad, changing the location of the right-of-way granted by Griswold and enlarging its width from forty to seventy feet. In the winter of 1872 and 1873, the Supreme Court of Missouri decided that the act to establish Forest Park was unconstitutional and void. Of course, with the downfall of the act, went all contracts and arrangements made by the Park Commissioners. The title of the County Railroad to the right-of-way granted by Griswold remained as it originally existed, unaffected by the attempted agreement with the Park Commissioners.

In 1874 the General Assembly passed a new act to establish Forest Park. This act was adjudged valid; by it also the government and control of the Park was vested in a Board of Commissioners. In section third, which provided for the vesting of the title to the property in the people of the County by general condemnation proceedings, was inserted this proviso: "Provided that nothing in this act shall prevent the St. Louis County Railroad from using and occupying a right-of-way of the width of not more than seventy feet through the northeastern portion of said Forest Park; the said railroad shall only enter the Park through Duncan's sub-division on the east side of said park, and running westwardly on the northern side of the River Des Peres, shall pass out of said park at a
446 point on the northern line thereof, east of Union Avenue, and provided further, that no switch or siding shall be constructed by said railroad company in said park, nor shall more than one depot be established in said park, and that shall be for passengers only; and provided further, that the grade of said railroad as far as the same runs through Forest Park, shall be approved by said Forest Park Commissioners." The route mentioned in this proviso departs from the route named in the Griswold deed and comes more closely to that named in the agreement of 1872, between the County Road and the Park Commissioners. In addition to this right-of-way through the park, the County Road proceeded to acquire title to certain tracts and parcels of ground along its route from the eastern boundary of Forest Park to the Union Depot. These tracts were not contiguous so as to form a continuous right-of-way, but were separate and with much intervening space between.

The St. Louis, Kansas City and Northern was the owner of a standard gauge railroad extending from St. Louis to Kansas City, with a branch running northerly from Moberly. It had for years entered St. Louis along the levee, reaching the city on the north side. Desiring to enter the Union Depot it proceeded to lay off a line from Ferguson, which ran parallel or nearly so, with the line of the County Railroad through the park, and thence easterly to the Union Depot. Such was the situation when the contracts which are the basis of the present claim were executed.

The first of these contracts was between the St. Louis County Railroad, party of the first part, and the St. Louis, Kansas City and Northern Railroad, party of the second part, companies, which for convenience hereafter, may be called respectively the County Company and the Kansas Company. By this contract, the County Company agreed to convey to the Kansas company an undivided one-half interest in the right-of-

way through Forest Park and a strip twenty-eight feet
447 in width through the several tracts owned by it, between the eastern limit of Forest Park and the western limit of the city, and a strip thirty feet in width through the various tracts owned by it eastward from those limits to the Union Depot. In consideration of this the Kansas Road was to pay $125,000. This contract further provided, that the right-of-way through the park, as well as a tunnel and cut contemplated just east of the park, were to be used in common by the two roads. Beyond that, eastwardly to the depot, the contemplation was of two separate rights-of-way, with independent tracks for each road, with a further provision that at two places, unless the County Road could obtain the use of the street, it should be permitted to put a third rail on the right-of-way of the Kansas Road. It was further provided, that the Kansas Road should construct and maintain the road-bed through the park and the tunnel and cut, hereinbefore referred to. Also that the County Company should within two years pay to the Kansas Company one-half of the cost of this construction, and that on failure thereof, it should forfeit all right and interest in said right-of-way and be forever excluded therefrom.

The second contract made the same day was what is known as the tripartite agreement, the parties to it being the Commissioners of Forest Park, party of the first part, the County Company, party of the second part, and the Kansas Company, party of the third part. Each of these contracts refers to the other, and while the tripartite agreement was executed after the other, they are so connected as properly to be considered parts and parcels of one contract. This tripartite agreement recited, that "said Forest Park Commissioners, in consideration of the relinquishments, agreements and stipulations hereinafter contained on the part of said party of the second part,
do hereby accept and approve the line and grade of said
448 railroad as laid down and described upon the accompanying plat and profile hereto attached, and forming part of this agreement; and said line and grade, in case there is no forfeiture of this agreement, is hereby fixed as the sole and finally established right-of-way to which said party of the second part is entitled by statute, or otherwise, through said park, or any part thereof, and the width of said right-of-way, as established by statute is hereby reduced from seventy (70) feet and fixed at forty-two (42) feet between its outer points;" then that the County Road in consideration thereof relinquished twenty-eight feet off the seventy feet established by statute for its right-of-way through Forest Park with the proviso that in case the right-of-way described and established should not be promptly placed at the disposal of the County Road, this agreement should be set aside and become null and

void. It then, in eight successive paragraphs, provided for the manner of constructing the road bed through the park by the County Road, and also for the building of the depot outside the right-of-way, but immediately adjoining thereto. The ninth paragraph reads as follows: "Said party of the second part shall permit under such reasonable regulations and terms as may be agreed upon, other railroads to use its right-of-way through the park, and up to the terminus of its road in the city of St. Louis, upon such terms and for such fair and equitable compensation, to be paid to it therefore, as may be agreed upon by such companies." The tenth paragraph is an admission by the County Road that its right-of-way is not exclusive and that this agreement is not to be construed as limiting or impairing the right of the Park Commissioners to grant another right-of-way to any other railroad company. The twelfth paragraph is as follows: "And, whereas, for the purpose of enabling the party of the third part to reach the Union
449 Depot, of St. Louis, Missouri, an amicable agreement and arrangement for a right-of-way outside of and through said Forest Park has been made and entered into by and between the parties of the second and third parts, and in pursuance thereof the parties of the second and third parts are to enter upon and enjoy the right-of-way and all the rights, privileges, immunities, powers, improvements and property belonging to, or vested in, or that may belong to, or vest in the party of the second part, in common, in, upon and through said park, under certain regulations, terms and conditions agreed upon by and between said parties therein. And, whereas, the party of the third part in further pursuance of said last named agreement, is about to construct, maintain and operate a railroad, in, upon, and through said park, at great expense, and to engage in other great outlays and to assume other heavy burthens and responsibilities to be of advantage to said third party, through the continued enjoyment of said right of way and other rights, privileges, powers, franchises, immunities, improvements and property in, upon and through said park. Now, therefore, in view of the premises and as inducements to said party of the third part to proceed as intended, the party of the first part does hereby grant and convey unto, and license and permit the said party of the third part, its successors and assigns, to have, hold, use and enjoy said right-of-way, in, upon and through said park in common with, and to be held and enjoyed, jointly with said party of the second part, and its assigns on the terms of the said contract between them and under the same terms and conditions as are hereby and hereinbefore imposed upon said party of the second part, and which are hereby assumed by said party of the third part as to improvements, except as to building a depot and switch in said park,

which the party of the second part is to do itself, or in case said party of the second part, its successors or assigns
450 should forfeit its said rights, privileges and franchises, in, upon and through said park, or from any cause, cease to have, maintain and enjoy the same, then it is hereby agreed and covenanted that the party of the third part shall not also be excluded from said park, but shall, with its successors and assigns, continue to have, maintain and enjoy all of said rights, privileges, immunities, franchises, improvements and property on the terms hereinbefore set forth, continuously and forever." The thirteenth paragraph provides that the Kansas Road shall have no depot in the park. The [fourteen] paragraph, so far as it is material, is as follows: "Now, therefore, in consideration thereof, and of the agreement of the party of the third part herein, the party of the first part herein accepts the agreement and contract of the party of the third part herein to execute, perform and comply with all of the terms, provisions, and things herein mentioned to be done, performed or complied with, as to said improvements, except as aforesaid, by the party of the second part hereto, so far as assumed, as aforesaid, releasing it therefrom, and in consideration thereof the party of the third part hereto covenants and agrees with the other parties hereto, that it will in lieu and stead of the party of the second part hereto, do, perform and comply with all the terms and provisions, matters and things herein expressed, to be done, performed or complied with, by said party of the second part, as to said improvements except as aforesaid, subject to the terms and conditions in said agreement of even date herewith contained, and it is hereby expressly covenanted and agreed, that a compliance by the party of the third part for itself, or for itself and the party of the second part jointly, in the construction of said railroad, in, upon and through said park, tunnel and cut in accordance with the terms of this agreement, shall be taken and accepted as a performance of the conditions imposed upon said party of the second part.
451 And it is expressly covenanted and agreed, that all and every part of the work, its kind, description and extent, to be performed by either of said parties of the second or third parts is herein above expressed, and neither of said parties shall be held or required to do or perform any other or further work and conditions than those hereby definitely set forth."

It will be observed that by the ninth paragraph the County Road agreed to permit the use of its right-of-way by other railroads; whether a like obligation was assumed by the Kansas Road depends upon the last sentence in the twelfth paragraph, which purports to grant to the Kansas Road, the right to occupy and enjoy the right-of-way through the park jointly with the County Road "on the terms of the said contract

between them and under the same terms and conditions as are hereby and hereinbefore imposed upon said party of the second part, and which are hereby assumed by said party of the third part as to improvements except as to building depot and switch in said park, which the party of the second part is to do itself."

It must be conceded that the meaning of this language is not perfectly clear. It is claimed by the defendants that the words "as to improvements, except as to buildings, etc.," qualify not only the immediately preceding clause, commencing "and which are hereby assumed" but also the one prior, commencing "and under the same terms and conditions," and therefore that the terms and conditions as to improvements are those alone cast upon the Kansas Road. This would make the two clauses but a single compound one, qualified by the following relative clause "as to improvements," etc. As against this it must be observed that grammatically, a relative clause generally qualifies its immediate antecedent, and therefore in this case would refer simply to that clause which provides for the assumption by the Kansas Road. This natural grammatical construction is strengthened by the punctuation,
452 a comma after the words "party of the second part," and none after the words "party of the third part," which seems to separate the entire first clause from the second and its qualifying terms. I know that the matter of punctuation is never relied upon to defeat the obvious intent; but when the meaning is doubtful, the puncuation is certainly a matter tending to throw light upon it. Further, there are not simply two, but really three antecedent clauses; the first one being "the terms of the said contract between them," that is the two railroad companies. Very clearly this qualifying clause does not refer to that, and therefore it should not be held to qualify the second, unless the obvious intent compels such construction. It is objected that the clause commencing "and which are hereby assumed" is under this construction superfluous. I think not. These improvements called for the expenditure of money, and the idea seemed to be that the Kansas Road should not only hold its rights upon certain conditions, but that as to those involving expenditure of money it should expressly assume the performance. There is a manifest difference between a conveyance subject to a mortgage and a conveyance in which the grantee assumes the payment of the mortgage. This distinction evidently dictated the form of expression used. Again, it is insisted that by the fourteenth paragraph, the parties expressly declared what they meant by the terms and conditions imposed upon the County Road, for in next to the last sentence quoted it is provided that "a compliance by the party of the third part for itself, or for it-

self and the party of the second part jointly, in the construction of said railroad, in, upon and through said park, tunnel and cut, in accordance with the terms of this agreement, shall be taken and accepted as performance of the conditions imposed upon said party of the second part." But this language, which while taken by itself seems very broad, must be construed in reference to the context. From the opening language
453 of the paragraph it appears that the parties were stipulating concerning the matter of improvements alone, and in reference to the party by whom said improvements should be made, and when in this sentence certain work done by the Kansas Road is declared to be taken and accepted as a performance of the conditions imposed upon the County Road, it must be taken as referring simply to the conditions in respect to improvements. This construction is strengthened by the language following this sentence, in which it is said that neither of said parties, neither the County Road nor the Kansas Road "shall be held or required to do or perform any other or further work and conditions than those hereby definitely set forth." Certainly it was not meant by this to nullify the provisions of the ninth paragraph or release the County Road from the stipulation therein contained. Making the fourteenth paragraph refer simply to the matter of improvements as indicated by its opening sentence, it becomes consistent and harmonious with the balance of the agreement. Further, it is insisted that if it was the intent of the parties that such an important obligation should be assumed by the Kansas Road, the language imposing it would have been more definite, precise and clear, and that the very uncertainty of this language precludes the idea that it was the intent of the parties that this obligation should be cast upon the Kansas Road. Counsel speak of it as "a ghastly blunder," and argue that from language of such doubtful import, no imputation of such a blunder ought to be cast upon the then representatives of the Kansas Road. Probably at that time, more than ten years ago, the assumption of such an obligation did not seem to be a matter of serious moment. Indeed, the very language in which the ninth paragraph is couched, and by which unquestionably such an obligation was intended to be cast upon the County Road, lacks as we shall hereafter see, the precision, certainty and ful-
454 ness, which in view of the present importance of such a stipulation, would to-day be expected. Again, it is insisted that there was no consideration for this stipulation on the part of the Kansas Road; it is urged that the County Road had by virtue of its deed from Griswold, and the act establishing Forest Park, a clear, legal title, to a right-of-way seventy feet in width, through the park; a title beyond the possibility of interference by the Park Commissioners; that the only power

left with the Park Commissioners was in respect to the grade. That the County Road had under the Statutes, a right to convey any or all of such right-of-way to the Kansas Road, and that having such right-of-way, an attempt by the Park Commissioners to impose this condition was unauthorized; that the assumption by the Kansas Road was without consideration and not binding. To this it may be replied, that the Park Commissioners accepted and approved the proposed grade; that by the last clause of the tripartite agreement they agreed to build and maintain certain arched entrances and exits from the park, and that as a matter of fact they did thereafter spend many thousand dollars in such work; and finally that the agreement indicates on its face, that it was made as a compromise of certain claims on the part of the respective parties. The law favors compromises; upholds them as considerations of the covenants of the compromising parties. The Park Commissioners claimed the right to grant a right-of-way through the park. By the terms of this tripartite agreement they conveyed this right, and approved the proposed grade and contracted to do work along that line. Clearly there was consideration for this stipulation. While I concede that the language is not entirely perspicuous, yet I think the true construction is that the Kansas Road assumed the stipulation of the ninth paragraph, that there was sufficient consideration, and therefore, a binding stipulation upon it.

455 For further argument tending to show that this is the true construction and that there was sufficient consideration, I refer to the elaborate opinion of the Special Master, filed in this cause. A solution of this question only opens the door to others, some of which are even more embarrassing and difficult of solution. It is insisted that by this stipulation the Railroad Company agreed to permit the use of its right-of-way, and did not agree to permit the use of its track or road-bed, and that the road should not be bound, therefore, beyond the very letter of its obligation.

Also, that this agreement was not one running with the land, that it bound only the party assuming it, as a merely personal covenant, and while therefore binding on the Kansas Road and also the Wabash Company, into which it was consolidated, it does not bind the mortgagees who take as purchasers and as purchasers without notice.

Further that the use by other railroad companies stipulated for, was to be only on such compensation as should be agreed upon by the parties, and that in the absence of such agreement by the parties, the Court had no power to determine the amount of compensation, or enforce the contract.

And again, that the contract is one which in its nature is not susceptible of specific enforcement, because the duties required by it and which are sought to be enforced are of a continuous character, require the personal skill and cultivated judgment of the officers of the defendant road, and therefore the matter cannot be disposed of by one decree but will require the permanent retention of the case, and constant supervision by the Court.

Still again, it is insisted that there is no mutuality in the contract, and that therefore it is one that courts will not specifically enforce, and finally that if all these objections fail, the amount of compensation reported by the Master is not fair and adequate, but should be largely in excess of that amount.

456 Of these, in their order. The language of the ninth paragraph, under which as before noticed, intervenors must claim, is that the party of the second part shall permit other railroads to use its "right-of-way." Now the term "right-of-way" has a two-fold signification; it sometimes is used to describe a right belonging to a party, a right of passage over any tract, and it is also used to describe that strip of land which railroad companies take upon which to construct their roadbed. Obviously, in this paragraph, it is used in the latter sense. Through both of these contracts the terms 'right-of-way," "track" and "road-bed" frequently appear, and in all cases the term right-of-way is used as descriptive of the strip above referred to. Notably in the fifth paragraph, is the distinction between the "right-of-way" and the "track" disclosed, in which it is provided, that the depot shall be wholly outside of the right-of-way, but immediately adjoining the track. Now, the right-of-way through the park as given by the Griswold deed, was forty feet, as fixed by the contract with the Forest Park Commissioners, was seventy feet, and by this present contract, forty-two feet. So the County Road conveyed to the Kansas Road outside of the park, a strip either thirty or twenty-eight feet in width for its right-of-way. My thought, at first, was that the intervenors could only claim a right to use so much of this right-of-way as was not in fact occupied by the track of the Wabash, and that all that was intended by this ninth paragraph was to permit other railroad companies to occupy and use so much of the Kansas Road's right-of-way as it did not itself occupy and use; but after reflection on the arguments of counsel, I have been lead to the conviction that this was too narrow a construction, and was not the real intent of the parties. The Master, in his report, shows that the entire right-of-way is occupied by tracks and sidings, so that there

is no room for another and independent track, and, as
457 there is nothing to show that this occupation has not been made in good faith, and to supply the needs of the Wabash Company, if my first interpretation had been correct, the intervenors would plainly be without any rights. I think, however, the true construction is this: That the Kansas Company was to have the first right, a right not limited to its necessities, but as broad as its convenience. Subject, and only subject, to such prior right, other companies were to have the use of the right-of-way, and if the respondent's business compelled the occupation by its tracks or sidings of the entire right-of-way, but the convenience of its business would permit the use of those tracks and sidings by another road, then such other road would be entitled to the use of both the right-of-way and the tracks and sidings. This construction is, I think, in accordance with the obvious intent of the parties who were contracting for general rights, and not fixing the specific details.

With reference to the next matter, it is not seriously contended that the obligations assumed by the Kansas Road are not also binding on the Wabash, because the latter is a mere consolidation of the former with other companies, but the contention is that the mortgagees take as purchasers, free from any burdens which do not run with the land, or of which they do not have either actual or constructive notice. On the same day on which these contracts were executed, the County Road executed a deed to the Kansas Road, of the undivided half of the right-of-way through the park and of the separate portions of the various parcels of ground eastward, to the Union Depot, which deed was recorded two days thereafter. This deed recites that it is executed "in pursuance of the terms of a certain contract made and executed by and between the parties of the first and second parts hereto, and dated August 11th, A. D. 1875, and in full satisfaction of so much of said contract
458 as relates to the conveyance of certain pieces of land and right-of-way, to said party of the second part by said party of the first part." Also towards the close of the instrument, after providing for a transfer of an undivided half of all right-of-way and all other rights and privileges, franchises, powers and immunities, owned by or vested in the party of the first part, in, through or upon Forest Park, it has these words: "All of which conveyances of the said right-of-way in this deed mentioned, are made subject to the terms and conditions upon which the same were granted to the party of the first part." Now, the tripartite contract was recorded prior to the consolidation of the Kansas Road with the Wabash, and prior to the issue of the mortgages referred to. There being express reference in the deed from the County Road to the Kansas Road, to the contract in pursuance of which the deed is made, and an

express declaration that the conveyances are made subject to the terms and conditions upon which the grantor received them, it seems to me that there is enough to cast upon even a bona fide purchaser notice of the terms and conditions of these contracts. It is argued, with great force, however, by counsel for the respondents, that even if the purchasers were charged with notice of these terms and conditions, as attaching to the lands described in the deed, in as much as the Kansas Road obtained a large portion of its right-of-way between Forest Park and the Union Depot from other sources, it took these latter portions free from any burden cast upon the lands specifically conveyed by the County Road. "Can it be," he says, "that a condition in a deed, of a few feet of the right-of-way, in a long line of three hundred miles casts a burden on the entire line, to be assumed by every succeeding purchaser?" I might answer this extreme case by a reverse question: Can it be possible, that a condition attached to substantially the entire right-
of way of this long line of road, can be defeated by the
459 fact that some few feet have been acquired by a deed
free from such condition? But these extreme cases do not constitute the practical matter before us. Here the County Road had an incomplete right-of-way through the park and to the Union Depot. A share of this incomplete right-of-way it conveyed to the Kansas Road, subject to certain conditions. Can it be that the completion by the Kansas Road of this right-of-way, by purchase of intervening and isolated tracts, destroys the entire value of the conditions? Looking at this matter in a practical way and from a reasonable standpoint; I think the answer to this question must be in the negative.

Passing to the next matter, the ninth paragraph contemplates that the conditions and compensation for use, should be determined by personal agreement. As there has been no such personal agreement, counsel deny the power of the Court to interfere, and say that any interference would be the making of a new contract. They refer to the familiar cases in which parties, in their contract, have stipulated for a particular mode of determining rent or other compensation, as by arbitration, etc. In such cases, courts have held that parties cannot ignore such stipulations and invoke the aid of the courts, in the first instance, to determine. But here the respondents deny the right. They never advanced to the position of a mere disagreement about the amount of compensation or terms of use. As the question of right must be settled before the question of compensation is presented, and as the respondents, by denying the right, have forced the intervenors to an application to the Court, it seems to me that the Court, taking cognizance of the question of right, is bound to determine the whole case, and settle both

the right and the compensation. It is a general doctrine that a court once taking jurisdiction of a controversy is bound to continue that jurisdiction up to the final determination of the entire controversy. The stipulation provided for use
460 under such reasonable terms and regulations and for such reasonable compensation as should be agreed upon. It cannot be that the mere whim and caprice of the one party, a blind refusal to come to any agreement, can nullify the entire force of the stipulation. It would make the right of the intervenors a mere barren right. It would nullify the entire stipulation, and operate simply to give to the respondents that which without it they had—the privilege of permitting other roads to enter. It would be mockery to call such a provision a stipulation for a right.

The next matter is one of exceeding difficulty. The stipulation in general in its nature, contains no provision as to details. Is it thereby rendered so incomplete that the courts may not enforce it? That a court may enforce, by its decree, either a contract or legislative right to the use by one railroad company of the tracks of another, cannot, it seems to me, under the intimations of the Supreme Court, in its recent decision in the Express cases, be doubted. In England legislation has been had in reference to this matter, and the right thus granted has been enforced by the decrees of courts; and so if this contract had provided the details, so that all that the Court would have to do, would be to declare by its decree, that the plaintiff was entitled to the benefit of such contract, the duty of the Court would seem plain. Does the omission of the details destroy the power of the Court, and practically nullify the force of the stipulation; or was it the intent of the parties simply to contract for a right, and leave with the Court, in the absence of the agreement of parties, the full determination of all the details? I am aware of the rule that courts are not bound to relieve parties from mistakes or omissions, or to complete contracts, which parties have left incomplete. But it is also true, that oftimes, at the making of the contract for a right, it may be impossible to determine details, or the changing situation of affairs may indicate that details also must be
461 subject to modification, and therefore should not be definitely prescribed, and should be left to settlement by agreement or decree at the time the right it insisted upon. In such cases, if the right is absolutely contracted for, and the details are of a nature which courts may properly fix and settle, then, I take it, the courts should not hold the contract incomplete, but determine the right, and also prescribe and settle the details. An act of the Legislature might be passed, giving to one company the right to use the tracks of another, and

prescribing all the terms and conditions, the details for the use. I take it, an act of the Legislature would also be valid, which simply declared that one company should have the right to use the tracks of another, upon such terms and conditions as the parties might agree upon, or should be prescribed by the courts; and if such a legislative act would have to be adjudged valid and complete, I see no satisfactory reason why courts may not also hold sufficient and valid a mere contract for the right, and determining the right, also settle and prescribe the terms of the use. It is true that such a decree cannot be executed by the performance of a single act it is continuous in its operation; it requires the constant exercise of judgment and skill by the officers of the corporation defendant; and therefore in a qualified sense, it may be true, that the case never is ended, but remains a permanent case in the Court, performance of whose decree may be the subject of repeated inquiry, by proceedings in the nature of contempt. It is also true, that in the changing conditions of business, the details of the use may require change. The time may come, when the respondent's business may demand the entire use of its tracks, and the intervenor's right wholly cease. But other decrees are subject to modification and change, as in decrees for alimony; the courts are not infrequently called to modify them by reason of the changed condition of the parties thereto. So, when a decree pas-
462 ses, in a case of this kind, it remains as a permanent determination of the respective rights of the parties, subject only to the further right of either party to apply for a modification, upon any changed condition of affairs; and, so far as any matter of supervision of the personal skill and judgment of the officers of the respondent corporation, the contract in terms provides, that the regulation of the running of trains shall be subject to the control of the officers of the respondent. While I concede that there is force in the objection that this must remain, in a qualified sense, a continuing case in the courts, with the constant duty of supervising the acts of the respondent, yet, it seems to me, that where there is a right, there must be a remedy, and that the mere machinery of court procedure is flexible enough to adapt itself to the necessities of protecting a right. Clearly, a mere action for damages would be a grossly inadequate remedy. Clearly the public interests justify, if they do not compel, the enforcement of this right, and so, with much hesitation, I have come to the conclusion, that this objection cannot be sustained.

So far as the objection on the ground of the want of mutuality in the contract, I think it of little force. The respondent has been paid for the privilege that is now claimed. The consideration, as I have heretofore shown, was ample, and when

a party has received payment for a privilege, I do not think it can resist the enforcement of that privilege on the mere ground that it cannot compel the other party to continue in its enjoyment.

The final matter is that of compensation. In this I think the Master erred. He fixed the value of the right-of-way at a million of dollars, and reported that, in his judgment, the share of the interest on this value and in the expenses of keeping up the track, which the intervenor company should pay, should be fixed upon a wheelage basis. So far as respects the mere matter of keeping up the track, I see no reason to doubt the
463 justice of the rule fixed by the Master; but, in regard to the interest on the value, I think the intervenor should pay one half of that, and for these reasons: It is a familiar fact, that in a large city like St. Louis, along the track of an important railroad, within the city limits, are built large manufacturing establishments, warehouses and other buildings for the convenient transaction of business between the carrier on one hand, the manufacturer and the merchant on the other. Another road coming over the same track not only uses the property, of great value, which the company owner has in the first instance paid for, but also shares in the benefit of access to all these manufactories, warehouses, &c. It thus places itself in competition with the original company for this valuable business. Such competition may operate to diminish the business of the original company, or compel it to lower its rates to preserve the business. In either way it operates to the serious detriment of the original company. The new company comes in as an equal competitor. It shares in all the benefits of its business, and it may share equally. Under those circumstances it seems to me no more than fair that a new company, which crowds itself into an equal access to such benefits and such privileges, should pay an equal share of the interest on the value of the property. Hence, I shall sustain the objections of the respondent to the report of the Master, so far as concerns the amount of compensation, and I think that the intervenor company must pay one-half the interest on the value and its share of the cost of keeping up the track, determined upon a wheelage basis. In other respects the report of the Master will be confirmed.

In conclusion, let me say, that I have given the various questions here presented, a most careful examination. I am fully sensible of the many difficulties that have attended the solution of these questions, and my conclusion has been reached after much hesitation. I have endeavored to preserve
464 fully the property rights of the respondent company; at the same time, I have been deeply impressed with the

truth, that railroads are performing a quasi public service, and that, so far as vested property interests are not impaired, such construction should be given to all contracts and legislation, as will make these public servants most fully subserve the interests and welfare of the general public.

(Signed) DAVID J. BREWER,
Circuit Judge.

Treat, D. J.

I concur fully with so much of the foregoing opinion as establish the intervenor's right to the entrance into St. Louis over respondent's right-of-way and tracks, subject to reasonable regulations by respondent for the safe conduct of persons and property in the common use thereof.

This case involves a very difficult and complicated inquiry and the Court has been embarassed by the many obscure details of the different contracts. After reading and analyzing with the most painstaking care the special and general provisions of the contracts in question, no other conclusion could be reached than that stated by my brother Judge, viz: that the intervenor has a right to the use of the track and right-of-way of the respondent. The very terms of the original contracts to which the respondent succeeds, cast upon it the obligations connected therewith. In other terms, it takes cum onere.

Hence, I concur fully with my brother Judge that the rights of user exists; but I differ as to the propriety or duty of fixing the measure of compensation in this stage of the case. Those terms are by the contract to be agreed upon by the parties; and why should they not have an opportunity to come to an agreement? True, the respondent denies the right of intervenor to the use of its track and right-of-way, and
465 consequently in the intermediate inquiry refused to enter upon terms. How could it make such terms without confessing intervenor's rights?

It having now been decided, with full concurrence on my part, that the intervenor has the right claimed, the difficult proposition is thrust upon the Court as to the terms of its enjoyment. By the contract itself, those terms are to be settled by the parties. Why should they not be permitted to do so? If, hereafter, it should occur that through fraud, attempted extortion, or otherwise, the right of user is to be practically defeated, the Court would necessarily lay its hand upon the transaction and enforce the respective rights of the parties as justice might demand.

It seems to me that the measure of compensation should not be prescribed at the present state of the controversy irrespective of the terms of the contract as to the mode of determining the same, the more especially as the intervenor has no exclusive right in the premises. Another railroad corporation may appear next year and insist upon its rights under the contract, and so on from time to time, successive corporations. The respondent must make necessarily the proper regulations for safety and otherwise, pertaining to the use of a common track, entering a large city like St. Louis, where the most complicated details are needed for approaches to a common depot.

It is true that the "Express cases" rested on an independent proposition, and consequently cannot govern this case. Here is a distinct contract by which the respondent is bound. It took cum onere. By the terms of the obligation, others could use, subject to its regulations, the common track and right-of-way, upon such consideration as the parties might agree upon. They have not as yet agreed and since this determination of the right of intervenor, no opportunity has been given them to consult and agree. It may be that they can do so,
466 more wisely and justly than the Court if opportunity is given. It is obvious, that courts are not, without fullest evidence before them, equal to the task if prescribing how railroads should be operated in the minute details, one with the other, in the interchange of traffic or use of common tracks, depots, etc. When difficulties arise, as now, where rights between them are to be determined, the adjustment of details should be left where the contract leaves it; otherwise not only great injury and confusion may occur, but the Court be compelled to retain an indefinite control of the case to meet ever shifting contingencies, as to transportation, new improvements advancing trade, &c., &c.

In my view of this case, the question of compensation between the parties should not be decided now, but reserved for further consideration.

There are some minor elements as to the status of the parties, technically which may be worthy of further consideration, should cause therefore be presented. By this is meant, the position occupied by the purchasing committee under the terms of sale heretofore made.

The result is, that I fully concur in the foregoing opinion, except so far as the same determines the measure of compensation between the parties—not that the rule may, or may not be correct, if the Court is compelled finally to pass upon the

same; but merely that such action is premature and should be reserved for further action, if needed.

467 Exhibit C to Partial Agreed Statement of Facts.

Form 994.

Memoranda of Agreement.

Made this First day of June, 1896, by and between the Wabash Railroad Company, party of the first part, and Berry-Horn Coal Co., its heirs or assigns, of St. Louis, Mo., party of the second part.

Witnesseth, That, whereas, the party of the second part, for the accommodation and promotion of its interests desire to have a side-track built from the line of the party of the first part, in the City of St. Louis, State of Missouri, to its Yard and Elevator, in said City, at a point located in City Block No. 2192, St. Louis, Mo.

I.

Now, therefore, It is agreed by the first party, to furnish the rail, switches, frogs, bolts and splices required in the construction of said side-track.

II.

The second party agrees that it will, free of all expense to said first party, furnish the right of way for said side-track, and will grade the same and perform all the labor the Engineer of the party of the first part may deem necessary to place the roadbed in proper condition to receive the track; this to include such portion of the grade as the proposed track may occupy over the right of way of the first party.

468 III.

The second party also agrees to furnish the ties and timbers necessary for the construction of said track, and will pay to said first party the amount expended for the labor of putting in the track over or upon the land owned by either party.

IV.

The second party also hereby agrees to pay to said first party, for the use of said side-track, the sum of Forty-four 76-100 dollars per annum; said sum being six (6) per cent. interest per annum on the cost of the material furnished by said first party in the construction of said tracks. Said rental to be paid semi-annually in advance.

V.

Said first party agrees to keep said roadbed and track in repair, but at the expense of the said second party, and in case

said party shall fail or refuse to pay for the cost of said repairs within thirty days after the presentation of bill for same, or shall fail or refuse to pay the car service charges that may accrue against it under the rules of the said first party, or of any Car Service Association, in force at point where said side-track is located, then the party of the first part shall not be bound to deliver any freight to it over said track, and may at its option declare this contract terminated, in which case it shall have the right to remove said rails, etc., as provided in Clause IX.

VI.

The first party shall have the right to use such track in the conduct of its business as a common carrier and carrier of passengers, and for such use no charge shall be made by the
469 second party; permission shall also be given to other parties to receive and deliver freight upon said track, when it can be done and not interfere with the proper handling of the business of the party of the second part; but such outside parties shall be required to pay to the second party for such privilege the sum of not less than fifty cents, nor more than one dollar per car; the amount to be charged for the privilege to be decided by the Superintendent of said Railroad from time to time.

VII.

In case it is desired by other persons engaged in business in the vicinity of said side-tracks to connect therewith or extend the same by building additional tracks from said side-tracks to their own warehouses, manufactories or premises, then such other persons shall have the right to make such connection and to use the said side-tracks upon paying therefor such sum to party of the second part as rental as may be deemed reasonable by the Superintendent of the party of the first part.

VIII.

The party of the second part hereby agrees that it will execute no mortgage or other lien upon the portions of the land upon which tracks are laid, which will become a lien on the material belonging to the party of the first part in said tracks.

IX.

It is also agreed that said party of the first part shall have the right, within thirty days after the termination of this contract, by notice or by expiration, for any reason, to enter peaceably upon said premises and remove the said rails,
470 switches, frogs, bolts and splices so furnished by it in the construction of said track.

This agreement to begin on the First day of June, one thousand eight hundred and ninety-six (1896), and to end on the 31st day of May one thousand nine hundred and one (1901), unless otherwise terminated, as herein provided, at which time it shall absolutely close and determine.

In witness whereof, the parties hereto have set their hands the day and year above written.

THE WABASH RAILROAD COMPANY,
By J. Ramsey, Jr., Vice-Pres. & Genl. Manager.

Recommended: H. S. Magee, General Superintendent.
Recommended: S. B. Knight, G. F. A.

BERRY-HORN COAL CO.,
By A. L. Berry, Vice-President.

471 In the Circuit Court of the United States.
For the Eastern District of Missouri.

The Central Trust Company of New York, et al., Complainants,
Nos. 2357 and 2464. vs In Equity.
The Wabash, St. Louis & Pacific Railway Company, et al., Defendants.

Consolidated Causes.

Copy of Portion of Decree of January 6, 1886, in said Cases, Retaining Jurisdiction over the Foreclosed Property.

"Nor shall such conveyance, transfer or assignment withdraw any of said railroads, property or interests to be sold under this decree, as hereinbefore directed, from the jurisdiction of this and the other Courts aforesaid, but the same shall remain in the custody of the Receivers until such time as the Court shall on motion direct said property in whole, or, from time to time, in part to be released to said purchaser or purchasers or any of them, and shall afterwards be subject to be retaken, and, if necessary, resold if the sums so charged,
472 or to be charged against said property or any part thereof, or said Receivers as aforesaid, said, shall not be paid within a reasonable time after being required by order of this or said other Courts. The conveyance and transfer of said property shall be subject to the power and jurisdiction of the said Courts, and the purchasers of any part of said property shall thereby become and remain subject to said jurisdiction so far as necessary to the enforcement of this decree. And such jurisdiction shall continue until all the claims and demands that have been or may be allowed against said property or any part thereof or said receivers by order of said Courts shall be fully paid and discharged. The provisions aforesaid shall apply to

the purchasers at said sale, and to all persons taking said property through or under them."

Copy of Similar Portions in Decree of June 15, 1886, Confirming Sale in said Cases.

"And it is further ordered, adjudged and decreed, that this decree of confirmation of the sale of the premises and property, rights and franchises as aforesaid and the deeds hereinbefore ordered to be made shall be subject to the terms and provisions of the decree of sale heretofore entered in this cause, whereby it is provided, in addition to the sums required by said decree of sale and by this order to be paid into Court in cash, that there should be paid such further sums as may be needed and as this Court may direct in order to meet claims which this Court may adjudge in this case to be prior in equity to the mortgages foreclosed by said decree, and whereby the
473 Court directed that the railroads, property, or interests sold thereunder should remain in the custody of the Receivers until such time as the Court should on motion direct said property in whole, or, from time to time, in part to be released to said purchasers, and should afterwards be subject to be retaken, and if necessary, resold, if the sums so charged or to be charged against said property or any part thereof of said Receivers as therein provided, should not be paid within a reasonable time after being required by order of the Court, and that the conveyance and transfer of said property should be subject to the power and jurisdiction of the Court, and the purchasers of any part of said property should thereby become and remain subject to said jurisdiction as far as necessary to the enforcement of said decree, and such jurisdiction should continue until all the claims and demands that have been or may be allowed against said property or any part thereof or said Receivers by order of the Court should be fully paid and discharged, and that the provisions aforesaid should apply to the purchasers at said sale, and to all persons taking said property through or under them, and shall be further subject to all the terms and conditions of said decree of sale."

Copy of Order of April 14, 1888, in said Cases.

"The transfer and assignment mentioned in the first paragraph of this order shall be made when the Wabash Western Railway Company shall have entered its appearance in this cause, and, in consideration of such transfer and assignment and pursuant to the terms and conditions of the decree
474 of sale herein, of date January 6th, 1886, and the order confirming said sale of date June 15, 1886, and the terms and conditions of the deeds by which said railway company ac-

quired from James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, the purchasing committee, a part of the property described in said decree of sale, by stipulation under its corporate seal, shall have assumed and agreed to pay all the claims and demands imposed upon the purchasers under said decree, and said order confirming the same, and upon their assigns; also all claims and demands against the Wabash, St. Louis & Pacific Railway Company which have been of may be adjudged to be superior in equity to the mortgages foreclosed by said decree, and which were not barred by the order of this Court entered herein on the 28th day of February, 1888; also all claims and demands growing out of the operation by said Receivers of the railway property lately in their charge which have been or may be adjudged to be superior in equity to the mortgages foreclosed by said decree, and which were not barred by said order of date February 28th, 1888."

Copy of Entry of Appearance of Wabash, Western Railway Company, Made and Filed in said Cases, May 14, 1888.

"Now comes the Wabash Western Railway Company, a corporation organized under the laws of Missouri, and in compliance with the terms of an order entered herein or or about the 14th day of April, 1888, and amended on or about May 8th, 1888, (with respect to the transfer to it, the said Wabash Western Railway Co., of the assets and accounts of the Receivers), it, the said Wabash Western
475 Railway Company hereby enters its appearance in this Court as a party to the above entitled cause, and in consideration of said order and the assignment and transfer by said Receivers to it, the said Wabash Western Railway Co., of all the assets, uncollected accounts and choses in action of the said Wabash, St. Louis & Pacific Railway Co., remaining in the hands of said Receivers; also all the assets, uncollected accounts and choses in action remaining in their hands and which have accrued to them as such Receivers from the operation of the railway property lately in their charge, and in pursuance of the terms and conditions of the decree of sale entered in said cause on or about January 6th, 1886, and the order confirming said sale, dated on or about June 15, 1886, and the terms and conditions of the deed by which said Wabash Western Railway Company acquired from James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, the purchasing committee, a part of the property described in said decree of sale, it, the said Wabash Western Railway Company, stipulates that it will pay, and it hereby assumes and agrees to pay all claims and demands imposed upon the purchasers under said decree, and said order confirming said sale, and upon their assigns, including all debts of the Wabash, St. Louis

& Pacific Railway Company for labor and supplies which said Receivers have been directed to pay and which were not barred by the order of this Court entered herein on the 28th day of February, 1888; also including all claims and demands growing out of the operation by said Receivers of the railway property lately in their charge, which have been or may be adjudged to be superior in equity to the mortgages foreclosed by said decree, and which were not barred by said order of February 28th, 1888."

* * * * *

476 In testimony whereof, said Wabash Western Railway has caused its name to be hereunto subscribed by its President, and its corporate seal to be hereunto attached by its Assistant Secretary, this 14th day of May, A. D. 1888.

WABASH WESTERN RAILWAY COMPANY,
By O. D. Ashley, President.

(Seal: The Wabash Western R'y Co., 1887.)

Attest: H. A. Lloyd, Assistant Secretary.

477 Depositions and Second Partial Agreed Statement of Facts.

Deposition of B. F. Taylor, for Interpleader.

In the Circuit Court of the United States, for the Eastern District of Missouri, Eastern Division.

Central Trust Company of New York et al., Complainants,
Numbers 2357 & 2464. v. In Equity.
Wabash, St. Louis & Pacific Company et al., Defendants.

Consolidated.

To the Wabash Railroad Company, and Wells H. Blodgett, H. S. Priest, and C. N. Travous, your attorneys of record: You are hereby notified that on Wednesday, the 4th day of November, 1903, The St. Louis, Kansas City & Colorado Railroad Company, Intervenor in the above-entitled cause, will in the above-entitled cause, at the office of W. F. Evans, in Room 902 of the Security Building, in the City of St. Louis, State of Missouri, take the deposition of B. F. Taylor, to be used as evidence on the trial of said cause, and on the hearing of each and every motion and application therein; and the taking of said deposition will be commenced at ten o'clock A. M. of said day, and be continued until six o'clock P. M. of said day, and that the taking of the same will be adjourned and continued from day to day, Sundays excepted, at the same place
478 until the taking of the same is completed. The reason for taking the evidence of said B. F. Taylor by deposi-

tion is, that the said witness lives at a greater distance from the place of trial of said cause than one hundred miles, and is about to go out of the district in which said cause is to be tried, and to a greater distance than one hundred miles from the place of trial before the time of trial.

Dated this second lay of November, 1903.

M. A. LOW,
FRANK HAGERMAN and
W. F. EVANS,

Attorneys for Intervenor, The St. Louis, Kansas City & Colorado Railroad Company.

We, the undersigned, do hereby accept due and legal service of the above notice on us this 3d day of November, 1903, and consent that said deposition may be taken at the time and place stated in said notice without further notice to us.

C. N. TRAVOUS,
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.....
Attorneys for the Wabash Railroad Company.

In the Circuit Court of the United States, for the Eastern District of Missouri, Eastern Division.

Central Trust Company of New York, et al., Complainants,
Numbers 2357 & 2464. v. In Equity.
Wabash, St. Louis & Pacific Railway Company et al., Defendants.

Consolidated.

Deposition of witness produced, cautioned, and sworn to testify the whole truth, and carefully examined on
479 Wednesday, the fourth day of November, 1903, commencing at the hour of ten o'clock in the forenoon of that day, at the office of W. F. Evans, Esq., Room 902 Security Building, in the City of St. Louis, State of Missouri, before me, Arthur E. Mooney, a Notary Public within and for the City of St. Louis, in the State of Missouri, in a certain cause now pending in the Circuit Court of the United States for the Eastern District of Missouri, Eastern Division, wherein the Central Trust Company of New York et al., are Complainants, and the Wabash, St. Louis & Pacific Railway Company et al., are Defendants, numbers 2357 and 2464 Consolidated, on the part of the St. Louis, Kansas City & Colorado Railroad Company, Intervenor.

Present: C. N. Travous, Esq., on the part of the Wabash Railroad Company, and W. F. Evans, Esq., on the part of the St. Louis, Kansas City & Colorado Railroad Company, Intervenor.

B. E. Taylor, of lawful age, being produced, cautioned and sworn to testify the whole truth, and carefully examined, deposes and says as follows:

Direct Examination

By Mr. Evans:

Q. Will you please state your name and place of residence?

A. My name is B. F. Taylor and I live in Battle Creek, Michigan.

Q. When do you expect to return to Battle Creek, Michigan, if at all? A. I expect to return this coming Sunday.

Q. What is your business?

A. Railroading, track department.

Q. What company are you working for now?

A. The Grand Trunk.

Q. How long have you been working for the Grand Trunk Railway and at what place or places?

480 A. I have been working for them since the 15th of June, 1902, between Battle Creek and Fort Ewing.

Q. How long have you been engaged in work of that character? A. In the track department?

Q. Yes.

A. I went to work in the track department in 1887.

Q. Did you ever work for the Wabash Railroad Company?

A. I worked for them about fourteen years.

Q. At what place?

A. Different places; all the way, you might say, from Kansas City to St. Louis there is hardly a town that I missed.

Q. Did you ever work for the Wabash Railroad Company in St. Louis? A. Yes, sir.

Q. At what time?

A. Well, I came here in 1898, I think, the spring of 1898, in July, the first of July, 1898.

Q. And worked until what time?

A. I worked up until the 11th day of July, 1901.

Q. What was the character of your work during that time?

A. Well, it was building and repairing the main line, the main track and the side tracks.

Q. What tracks do you speak of; leading which way from St. Louis, and of what road? A. The Wabash road.

Q. Did they have one or two lines of track?

A. Two main lines.

Q. The line that you speak of is that which leads out west?

A. Yes, sir; I did not go any farther out than the tunnel at Forest Park.

Q. What position did you occupy there?

A. Section foreman.

Q. What was the number of your section?

A. Number one.

Q. To and from what places did it extend?

A. From 18th street to west of the tunnel, mile post 4.

Q. Mile post 4, where is that with reference to Forest
481 Park?

A. Just west of the tunnel, right this end of the park.

Q. Did you have a crew of men under you? A. Yes, sir.

Q. How many did you usually have?

A. We generally, in the summer time, had all we could get; in the winter time it ran down to eight and ten men, sometimes more when it snowed.

Q. What would be the largest number that you had?

A. During the summer?

Q. Yes.

A. I worked as high as thirty men here at times.

Q. State fully what you and your men did, what your duties were on those tracks?

A. We done a little of everything; we were on the main line repairing the track and sometimes on off tracks, on side tracks, private tracks, sometimes building new tracks.

Q. Did your work include the main line, the side tracks and the tracks leading to different industries? A. Yes, sir.

Q. You constructed tracks as well as maintained them and repaired them? A. Yes, sir.

Q. All kinds of tracks? A. Yes, sir.

Q. On that section? A. Yes, sir.

Q. Were you section foreman during the time that you have stated? A. Yes, sir.

Q. And all that time? A. All that time.

Q. Is it a fact that in the construction and maintenance and repair of all those tracks you and your men worked together?

A. Yes, sir.

Q. Were there quite a good many tracks leading to the different industries alongs that line, along that section?

A. Yes, sir; during my time there.

Q. You were familiar with them, then? A. Yes, sir.

Q. And remember now their location, do you?

A. No, sir.

482 Q. I mean as they were located then? A. Yes, sir.

Q. What had you and your men to do with the maintenance of the tracks leading to the different industries?

A. We repaired them when they needed repairing.

Q. What did you have to do with the construction of them, you constructed such tracks as were constructed leading to the different industries, didn't you? A. Yes, sir.

Q. Do you remember of the construction of a track on that section leading to the Empire Brewing Company, a short distance west of Sarah Street and on the north line of the Wabash main line? A. Yes, sir.

Q. Who constructed that track? A. I put it in.

Q. That is, you and your men? A. Yes, sir.

Q. When did you construct that track?

A. It was in March, I think, 1900; I am not positive whether 1900 or 1901.

Q. I wish you would think about it and see whether it was 1901, I am not sure myself?

A. I couldn't swear to either one, but I know I put it in in the month of March, I think we turned it over in April to them; it was finished up to the building line; I think it was 1901 that it was constructed.

Q. What wages did you draw while you worked for the Wabash Railroad Company? A. $65 per month.

Q. All the time? A. All the time.

Q. Do you know of certain tracks leading to the Heinrich Coal Company, north of the Wabash main line and a short distance west of Manchester Avenue on that section? A. Yes, sir.

Q. Who constructed those tracks?

A. I constructed some of the work there, tracks that went in there, I think there is three; I extended one and put in two more new ones.

Q. That is, you and your men constructed them and extended them? A. Yes, sir.

Q. That was when?

A. In June or July, 1900; we would go in there for a day
483 or two and grade and then we would extend the track along.

Q. Do you speak of the extension of those tracks or the construction of them?

A. There was one extended and two built, that is No. 6 was extended across Duncan Avenue over to the Boulevard.

Q. Do you know of certain tracks leading to the New Union Sand Company, north of the Wabash main line and between Manchester Road and Spring Avenue? A. Yes, sir.

Q. Who constructed those?

A. I constructed them; only one was put in there.

Q. You and your men did it? A. Yes, sir.

Q. When did you construct that track?

A. We started in June and finished in July, 1901.

Q. Now, I believe you say you quit working for the Wabash Railroad Company in July, 1901? A. Yes, sir.

Q. What day of the month? A. The 11th day of July.

Q. Do you know of a track leading to the Ludlow-Saylor Wire Company, south of the Wabash main line and east of Newstead Avenue? A. Yes, sir.

Q. Who constructed that track?

A. Me and my men constructed that.

Q. And when did you construct it?

A. I am not positive about that track, whether it was 1899 or 1900; we started that track in March, though, and finished it in April.

Q. To refresh your memory, wasn't that in 1900?

A. It was either in 1900 or 1901; I am not positive.

Q. What is your best recollection about it?

A. It would not be any better than that, I could not say.

Q. Do you remember the track leading to the Polar Wave Ice Company, north of the Wabash main line and west of Newstead Avenue? A. Yes, sir.

Q. Who constructed that track? A. Me and my men.

Q. And when was that constructed? A. In 1901.

484 Q. What month?

A. It was in August, I think, we finished that track.

Q. Wasn't that just before you quit? A. No, sir.

Q. You quit in July?

A. In June we finished that track; in June, 1901.

Q. Mr. Taylor, what is the fact as to whether or not you and your men worked on these different industrial tracks, or tracks leading to the different industries quite frequently while you worked there?

A. We worked quite frequently on a good many of them off and on.

Q. Was there a month during the time that you worked there, from the time that you have stated that you first commenced on Section 1 until the time that you quit in July, 1901, in which you and your men did not work on some of them?

A. Yes, sir; months we did not work on them at all.

Q. I mean on some of the tracks?

A. No tracks outside of the company's.

Q. You did not understand me; was there a month during the time that you worked there that you and your men did not do some work on some industrial track?

A. Yes, sir; we never worked on some of them.

Q. What is the fact as to the Wabash main line on that section being a single track or double track?

A. It was a double track over my part of it.

Q. That was during all the time that you worked there?

A. Yes, sir.

Q. Were cull ties used in any of the tracks while you worked there? A. They were used in outside tracks.
Q. Were any used in the main line?
A. We used a few from 23d street up there.
Q. When did you use those on the main line?
A. We used them in 1900, off and on, putting them in there.
Q. Were they used at any time except 1900, cull ties?
485 A. No, sir; I don't think we did, we only used a few down here.
Q. What kind of switch stands were used in the main line when you were there?
A. The high stand, the Elliott stand.
Q. Was any other kind used on the main line?
A. No, sir.
Q. What kind were used in the other tracks?
A. The low ball stand and the pony stand.
Q. What about the frogs, what number of frogs were used in the main line? A. No. 9's.
Q. Was No. 9 used all the time? A. All the time.
Q. What kind were used in the other tracks?
A. 6's and 7's.
Q. Who kept the time that you and your men worked on that section? A. I did.
Q. How did you keep it, that is in a book or how?
A. Yes, sir; in a book.
Q. Did anybody else keep it? A. No, sir.
Q. Was there a report made each month to the company, or to the man under whom you worked, showing the time that the men worked during the month? A. Yes, sir.
Q. Who would make that report?
A. I would make that myself.
Q. Did you make that in writing? A. Yes, sir.
Q. To whom did you make the report?
A. To Mr. A. S. Haines.
Q. What position did he occupy?
A. General road master.
Q. And where was his office? A. At Moberly.
Q. In making that report whose name appeared on the report first? A. On the pay roll, you mean?
Q. Yes? A. My name.
Q. And following your name were the names of your crew?
A. Yes, sir.
486 Q. And following each name what would appear, the time? A. Yes, sir.
Q. The time that was made by each man during that month?
A. Yes, sir.
Q. About when did you make those reports?

A. Those reports were sent in about the 28th of every month, if it was thirty-one days it went in on the 29th and if thirty days it went in on the 28th.

Q. You would make a report the last of each month showing the time that each man worked during that month on that section? A. Yes, sir.

Q. Showing all the time? A. Yes, sir.

Q. Did anybody else make those reports?

A. No, sir; not to my knowing.

Q. Did anybody else keep the report of the time that the men were employed on that section except yourself?

A. No, sir.

Q. Now in reporting your time did you report your name as "B. F. Taylor" or as "Benj. F. Taylor," or in both ways?

A. Both ways; it used to be "B. F." and we got an order from the company to put in the full given name, and then I used "Benjamin."

Q. So that you reported it both ways? A. Yes, sir.

Q. Where on that section was trestle track No. 8 located?

A. Trestle track No. 8, I think that was in Heinrich's coal yard.

Q. The track that leads to Heinrich's coal yard?

A. Yes, sir.

Q. I wish you would state how the bridges were numbered?

A. On the main line?

Q. Yes.

A. I can't tell you anything about it; I don't know anything about the bridge department.

Cross examination waived.

Counsel for defendants objects to the forgoing deposi-
487 tion as incompetent, irrelevant and immaterial and states that he reserves the right to insist upon said objection at the trial.

B. F. TAYLOR.

Subscribed and sworn to before me this 4th day of November, 1903. My commission expires November 4, 1905.

(Seal) ARTHUR E. MOONEY,
Notary Public.

State of Missouri,
City of St. Louis—ss.

I, Arthur E. Mooney, a Notary Public within and for the City of St. Louis, State of Missouri, do hereby certify that, in pursuance of the annexed notice, came before me at the office of W. F. Evans, Esq., Room 902 Security Building, in the City

of St. Louis, State of Missouri, on the 4th day of November, 1903, at 10 o'clock A. M. of said day, B. F. Taylor, who was by me cautioned and sworn to testify the whole truth, and carefully examined; that his testimony as above set forth was taken by me in shorthand by consent of counsel for the defendants and the intervenor in the presence of the witness, and afterwards transcribed on the typewriter, and subscribed by said witness in my presence at said time and place and on the day aforesaid, and his said deposition is now herewith returned.

I further certify that the said witness is a resident of Battle Creek, in the State of Michigan, a greater distance from the place of trial of said cause than one hundred miles and that he is about to go out of the district in which said case is to be tried to a greater distance than one hundred miles from the place of trial before the time of trial, is the reason for taking the testimony of said witness by deposition; that said
488 deposition was retained and kept in my possession until it was, together with the certificate of the reason for taking it, and the notice given to the adverse party, by me sealed up and delivered by me to said court; that I am not of counsel or attorney to either of the parties, nor interested in the event of said cause or proceeding; and I further certify that I am duly qualified as a notary public and that my term expires on the 4th day of November, 1905.

In testimony whereof I have hereunto set my hand and affixed my notarial seal at the City of St. Louis, in the State of Missouri, this 4th day of November, 1903.

(Seal) ARTHUR E. MOONEY,
Notary Public.

489 Depositions of A. S. Haynes and Others.

In the Circuit Court of the United States for the Eastern Judicial District of Missouri, Eastern Division.

Central Trust Company of New York et al., Complainants,
Numbers 2357 & 2464, vs. In Equity.
Wabash, St. Louis & Pacific Railway Company et al., Defendants.

Consolidated.

To the Wabash Railroad Company, and Wells H. Blodgett, H. S. Priest, and C. N. Travous, your attorneys of record:

You are hereby notified that depositions of witnesses to be read in evidence in the above-entitled cause, on the part of The St. Louis, Kansas City & Colorado Railroad Company, Intervenor, will be taken at the office of James R. Gray, United

States Commissioner for the Circuit Court of the United States for the Eastern Judicial District of Missouri, Eastern Division, in Custom House, at the northwest corner of Eighth and Olive Streets, in the City of St. Louis, State of Missouri, on Wednesday, the twenty-fifth day of May, 1904, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day; and that the taking of said depositions, if not completed on that day, will be continued from day to day, at the same place and between the same hours, until completed.

Dated this eighteenth day of May, 1904.

M. A. LOW,
FRANK HAGERMAN,
W. F. EVANS,
Attorneys for Intervenor, The St. Louis, Kansas City & Colorado Railroad Company.

490 Service of the above notice is hereby acknowledged, and issue of dedimus, and all exceptions as to time waived; and it is agreed that said depositions may be taken in shorthand, transcribed, and then signed by the witness.

W. H. BLODGETT,
.....
C. N. TRAVOUS,
Attorneys for The Wabash Railroad Company.

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Central Trust Company of New York et al., Complainants,
Nos. 2354 and 2464. v.
Wabash, St. Louis & Pacific Railway Company et al., Defendants.

The St. Louis, Kansas City & Colorado Railroad Company, Intervenors.

Depositions of witnesses produced, sworn and examined in the above-entitled cause pursuant to notice hereto attached before James R. Gray, United States Commissioner, at his office, room No. 342 Custom House, in the City of St. Louis Missouri, commencing at the hour of eleven o'clock in the forenoon of Wednesday, May 25th, A. D., 1904.

By agreement of parties the said depositions are to be taken down in shorthand by Edward A. Haid and by him afterwards transcribed on the typewriter.

Present: C. N. Travous, Esq., and H. S. Priest, Esq., on the part of the Wabash, St. Louis & Pacific Railway Com-
491 pany. W. F. Evans, Esq., and Frank Hagerman, Esq., on the part of the St. Louis, Kansas City & Colorado Railroad Company.

Deposition of A. S. Haynes.

A. S. Haynes, a witness on behalf of The St. Louis, Kansas City & Colorado Railroad Company, being duly sworn, on his oath deposes as follows, to-wit:

Q. State your name? A. A. S. Haynes.
Q. Where do you live? A. Moberly, Missouri.
Q. What is your business?
A. Roadmaster Wabash Railroad, St. Louis Division.
Q. Of what Company? A. Wabash Railroad.
Q. How long have you been roadmaster for the Wabash Railroad? A. I was general roadmaster fifteen years.
Q. Since what time? A. The first of July, 1889.
Q. What territory do you cover?
A. I covered all the territory west of the river up to the eighteenth of January, last.
Q. Were the Wabash tracks in St. Louis as well as those extending west of St. Louis, under your jurisdiction?
A. Since July 1, 1889, yes, sir.
Q. Up to the present time?
A. Up to last January, and in St. Louis and to Des Moines since then.
Q. State what your duties were and are in general?
A. I simply look after the tracks; keep them in shape the best I can.
Q. I mean to ask you what your duties are in looking after the track?
A. I look after the laboring gangs and work trains—
Q. Do you know that part of the Wabash track between Eighteenth street in St. Louis and Forsyth Junction that is used by the Wabash and The St. Louis, Kansas City & Colorado Railroad Company? A. Yes, sir.
492 Q. What number section of track was that on?
A. Section number one, mile post four.
Q. Commencing at what point?
A. It commenced at Eighteenth street part of the time—until the Terminal took it away; it now commences at Twenty-third street and extends west to mile post four.
Q. Where is that with reference to Forsythe Junction?
A. One mile East of Forsythe Junction.
Q. At that point the east end of section two begins?
A. Yes, sir.

Q. And extends west how far?

A. To mile post eight or nine—to Eden.

Q. How much of section two is used by the trains of the two companies, which might be called joint track?

A. Nearly a mile and a quarter.

Q. Taking these sections, Mr. Haynes, has the same section gang looked after both sections?

A. Yes, sir. That is, there are two gangs which work back and forth indiscriminately.

Q. What is the weight of the rail used in the main line of the Wabash?

A. Up to January we had seventy pound rail on the main line.

Q. By the main line you mean that part between Eighteenth street and Forsythe Junction?

A. Yes, sir. One in and one out from Eighteenth street and Forsythe Junction.

Q. And up to January last you had seventy pound rail on that line? A. Yes, sir.

Q. How long had it been there?

A. I cannot answer definitely.

Q. What is your recollection?

A. Ten or twelve years, I think; I won't say positively.

Q. During that time has any rail been placed in the main track lighter than seventy pounds?

A. I can't say. I don't think there was. I think that
493 after commencing to put the seventy pound rail in we left it in.

Q. What system have you, Mr. Haynes, respecting reports from section foremen showing the labor and men employed as well as the work they performed?

A. We have weekly reports showing the number of men and the material used and a monthly report showing the number of men and number of days.

Q. How long has that monthly report been made?

A. Ever since I have been with the Wabash.

Q. Is that called a check roll? A. Yes, sir.

Q. I now hand you, Mr. Haynes, a report dated or rather for the month of May, 1889, for labor performed, etc., on section one, and ask you if that is the form of check roll report used during all the time you refer to?

A. Yes, sir; I think that is the regular check roll as far as I know. The large sheet is used for large gangs and the small one for ordinary section gangs.

Judge Priest: There appear to be three sheets attached together, which one do you propose to use?

Mr. Evans: They all form one report, don't they, Mr. Haynes?

A. Yes, sir. The large one for large gangs and the small one for ordinary section gangs.

Mr. Evans: I will ask the Commissioner to mark this paper Exhibit 1 of Mr. Haynes' testimony.

Q. Mr. Haynes, what is the rule of the Wabash Company respecting side track reports made by section foremen?

A. They make a report to the office—

Q. I mean the annual reports, do they make one about the first of the year?

A. No, sir; the track is reported when it is put in.

Q. You don't understand me—was it not true some years ago, that the section foremen about the first of the year made a report showing all side tracks on each section?

A. Yes, sir.

494 Q. And along, say about the first of January, 1890, or 1891, each section foreman would make a report showing the side tracks and the length of them and the names, on his section the first of every year?

A. I think it was made in June or July, I am not sure of that.

Q. I hand you a report, Mr. Haynes, which purports to have been made by Mr. John Reagan, dated the 13th of January, 1887—that is the kind of report you spoke of?

A. That is probably not a regular report; that was just called for, probably. You will note that that report was made to Mr. McGuigan. I don't think it was an annual report to him; may possibly have been.

Q. Who was Mr. John Reagan, Mr. Haynes?

A. I don't know; we have had three John Reagans on the road, two were foremen and one roadmaster; I don't know which one was in the yard at that time.

Q. Look at the report I referred to and see if that will refresh your memory? A. I can't say who he was.

Q. Were these reports made by laborers or foremen?

A. By the section foremen.

Q. Then you would say that it was made by a section foreman?

Judge Priest: We object to his testifying from that report unless he knows of his own knowledge.

A. Yes, sir; I would say it probably was.

Q. Were any of the laborers required to make or did they make any reports of the kind you now hold in your hand, except the section foremen?

A. No, sir; I never asked anyone but section foremen to make them.

Q. And so far as you know, they were not made except by section foremen?

A. Section foremen or roadmaster.

Mr. Evans: I will ask the Commissioner to mark this paper Exhibit 2 to Mr. Haynes' testimony.

Judge Priest: The authenticity of that report is not
495 proven and it is objected to as evidence of anything except the paper was handed to the witnesses.

Q. Did you ever have a section foreman during the time you have spoken of, by the name of J. P. Kelso? A. Yes, sir.

Q. I will hand you a report signed by him and dated January 1, 1891, and ask you to state what it is?

A. It is a statement of the length of tracks on section number one; so he says in his report.

Q. You look at it, please, and state what it is without reference to what the foreman says?

Mr. Evans: All reports that will be referred to, unless they are objected to for that reason, were produced by the Wabash Railroad at my request, as I understand. Is that not so, Mr. Travous?

Mr. Travous: Well, I brought them over, but where they came from I don't know. I got them from Mr. Andrews. I understood that they were brought from Moberly either by your man or at your request.

Mr. Evans: That is, they came out of your office at Moberly?

Mr. Travous: I don't know.

Witness (answering question): This is a report of the number of tracks and length of the same in section one.

Q. What is the fact, Mr. Haynes, as to the annual reports that were required to be made by section foremen regarding side tracks on the different sections—when were they made—about when?

A. I don't know. Orders came from the superintendent's office frequently to have the tracks measured. They were usually made by the clerks in the office and passed out to the foreman or roadmaster. Whether it was a regular thing or not, I don't know.

Q. You don't know whether they were made the first of the year or in June? A. No, sir; I can't say.

Q. Mr. Haynes, I wish you would take this exhibit 2
496 and state what length of time or rather how long the side-tracks referred to therein had been in the track at the time that report was made? A. I can't do that.

Q. Say about?

A. This was before my time. I had nothing to do with the territory down here previous to 1889. This report is dated 1887.

Mr. Evans: I will ask the Commissioner to mark this paper, dated January 1, 1891, Exhibit 3, to Mr. Haynes' testimony.

Cross Examination

By Mr. Travous:

Q. Mr. Haynes, your personal knowledge of this section one and section two begins in 1889, does it not? A. Yes, sir.

Q. You have no knowledge of it prior to that?

A. No, sir; I was in the territory west.

Q. And in regard to this report of John Reagan, made January 13, 1887, you have no knowledge of it? A. No, sir.

Q. You know nothing about that except from what appears upon its face? A. That is all.

Q. You don't know why it was made or for what purpose?

A. I know nothing about it.

Q. You don't know what use was made of it or whether it is correct or incorrect? A. No, sir.

Q. Neither have you any personal knowledge as to whom it was made by?

A. No, sir; I don't know which one of the John Reagans.

Q. You know nothing outside of what appears upon the face of it? A. No, sir.

Q. In regard to this report of Kelso, made about the first of January, 1891, you do not remember either whether that was made upon special request or for what purpose, do you?

A. No, sir.

Q. Nor what use was made of it? A. No, sir.

497 Q. Then as to this you have no personal recollection either? A. No, sir.

Q. In fact it may not have passed through your hands personally at all?

A. I may not have seen it at all; I don't suppose I did; the clerk in the office attended to that.

Q. So that you may not have seen it at all prior to to-day?

A. No.

Re-direct Examination

By Mr. Evans:

Q. Do you know F. H. McGuigan, to whom the report of John Reagan, dated January 13, 1887, marked Exhibit 2 is addressed?

A. He was general roadmaster of the Wabash at that time.

Re-cross Examination

By Mr. Travous:

Q. Do you know personally that he was general roadmaster of the Wabash the date of that report—have you personal knowledge of that or do you speak from hearsay?

A. I was roadmaster under him; I was working for him.

(Signature Waived.)

Deposition of Michael Hines.

Michael Hines, a witness on behalf of the St. Louis, Kansas City & Colorado Railroad Company, being duly sworn, on his oath deposes as follows, to-wit:

Q. State your name? A. Michael Hines.

Q. Where do you live? A. St. Louis.

Q. What is your business? A. Locomotive engineer.

Q. For what company?

A The St. Louis, Kansas City & Colorado Railroad Company.

Q. How long have you been in the employ of that company?

A. As locomotive engineer, since March 12, 1887.

Q. What line do you run over and have you run since March, 1889.

A. St. Louis to Forsythe Junction, over the Wabash, over the St. Louis, Kansas City & Colorado for several years,
498 and over the Bell of the St. Louis, Kansas City & Colorado to Elwood.

Q. Have you been running over the joint tracks between St. Louis Union Station and Forsythe Junction since March, 1887?

A. Yes, sir.

Q. Continuously?

A. About seven or eight months I was off.

Q. What months do you speak of; in what year? A. 1893.

Q. What was the character of the switch stockets or switch stands on the main line of the Wabash between Eighteenth street and Forsythe Junction during that time— high or low stands? A. High.

Q. State whether or not there were any low stands on the main line during that time between these points?

A. No, sir; none that I know of.

Q. How often during the time that you have spoken of did you pass over the joint tracks between Union Station and Forsythe Junction?

A. Generally twice a day; sometimes as often as five or six times a day.

Q. What is the fact as to whether or not you have been familiar with the track during all of that time?

A. I have been, yes, sir.

Cross Examination

By Mr. Travous:

Q. You say you operated on this line between Forsythe Junction and Eghteenth street during what period?

A. I commenced in March, 1887, and have been running over it ever since, with the exception of seven or eight months.

Q. And you would go over that track how often on an average—daily would you?

A. Yes, sir; sometimes four times a day for a year and sometimes twice a day. At first I went over four times a day—made two trips.

Q. So that you were so familiar with it that it didn't require any particular observation as to the kind of switch stands?

A. I only observed the switch stands.

499 Q. You would only observe the switch stands but there was nothing to cause you to specially observe the make of switch stands? A. No, sir; I could not say so.

Q. When was your attention first specially directed to the question of the kind of switch stands that were used on the main line? A. I don't know.

Q. Was it ever? A. Never before to-day.

Q. Then it is possible that there might have been some low stands that you had not paid particular attention to?

A. Not on the main line.

Q. Why not? A. I think I would have noticed them.

Q. But would you necessarily have carried the fact in your mind that they were low instead of high, or high instead of low?

A. I believe I would if there was a low stand there; I would have noticed it and remembered it.

Q. Your recollection is that if there had been low stands you would have noticed them? A. Yes, sir.

Q. Yet there might have been low stands and you not have noticed it, might there not?

A. On the main track if there had been low stands I would have remembered it.

Q. Have the switch stands during all the period you have mentioned been of the same make, the same pattern?

A. They have been the high stands.

Q. That is as near as you can say, but whether or not they were the same make, you don't know? A. No, sir.

Q. How high have they been?

A. I expect six feet or more.

Q. Seeing them as often as you have, can't you state more accurately than that?

A. I can't say just exactly; probably six feet to the top—may be a little less.

Q. And you can't say how many makes or what different makes were used? A. No, sir.

Q. There were a good many other engineers running over the road at the same time, were there not? A. Yes, sir.

Q. About how many?

500 A. Employed by the St. Louis, Kansas City & Colorado?

Q. Yes, both companies?

A. I can't say how many the Wabash did employ.

Q. How many did your company employ?

A. Two or three.

Q. You don't remember exactly?

A. There were at times two and other times three.

Q. Do you remember their names? A. Yes, sir.

Q. I wish you would state their names?

A. S. W. Ashmead was one.

Q. And he ran during what period?

A. From 1887 till 1902 or 1903.

Q. And who else? A. Victor Jones.

Q. What became of Ashmead?

A. I think he went to Indianapolis to work on the Big Four.

Q. The next one? A. Victor Jones.

Q. During what period did Mr. Jones work on the line?

A. In 1888.

Q. What became of him? A. He is dead.

Q. And the third man? A. That was later, about 1890.

Q. What was his name? A. E. E. Hill.

Q. Did he quit? A. He died.

Q. Now what others? A. Mr. Decker.

Q. Do you know his full name? A. Warren Decker.

Q. He ran during what period?

A. Along after 1890; 1893 or 1894, I guess.

Q. When did he quit? A. He is still working there.

Q. Is that all?

A. There have been men working there a short time. I cannot say just what period they worked there.

Q. You don't recall their names?

A. Yes, sir; a man named Mark Waters; a man named Thomas Carmody.

Q. You simply handled trains ready made up over the

501 main line, is that right?

A. I handle trains ready made up and sometimes make up my own trains in the yard.

Q. And handle them over the main line? A. Yes, sir.

Re-direct Examination

By Mr. Evans:

Q. In passing over a road, what are the principal objects an engineer watches for? A. Switches.

Q. The switches, switch stockets and so forth?
A. Yes, sir.
Q. They are kept there to be seen by him or by what employees? A. The engineer.

(Signature waived.)

Deposition of Warren Decker.

Warren Decker, a witness on behalf of The St. Louis, Kansas City & Colorado Railroad Company, being duly sworn, on his oath deposes as follows, to-wit:

Direct Examination

By Mr. Evans:
Q. What is your business? A. Locomotive engineer.
Q. How long have you been a locomotive engineer?
A. Ten years.
Q. What company do you work for?
A. The Colorado Road.
Q. How long have you been working for that company?
A. Since 1888.
Q. On what road have you been running during that time?
A. On the St. Louis, Kansas City & Colorado and the Wabash.
Q. What part of the Wabash?
A. From Union Station to Forsythe Junction.
Q. Before you were engineer, what position did you occupy?
A. Fireman.
Q. You have been passing over the Wabash between Forsythe Junction and Union Station either as fireman or engineer since 1888? A. Yes, sir.
502 Q. Continuously? A. Yes, sir.
Q. During that time, how often have you passed over that road each day? A. From two to five or six times a day.
Q. Have you been during that time, and are you now familiar with the Wabash tracks? A. Yes, sir.
Q. And the switch stands and switch stockets?
A. Yes, sir.
Q. State the character and kind of switch stands and switch stockets maintained on the line during that time?
A. High switch stands.
Q. Do you remember seeing any low switch stands?
A. No, sir.
Q. What attention, if any, does an engineer or the engineers require to give to the switch stands and for what purpose?
A. To see whether they are set for the main track or the side track.
Q. Then he is required to notice them? A. Yes, sir.

Cross-Examination

By Mr. Travous:

Q. Were the switch stands, during the period that you ran over that line, as you now remember, always of the same height—I mean, did they vary in height during that time?

A. No, sir; about the same height; about six feet.

Q. You say about the same height?

A. Yes, sir. They would change once in a while, but they were always the same height.

Q. That is, you don't remember any material change in the height? A. There has been no change, no, sir.

Q. Your recollection is that the height during that period was about six feet? A. Yes, sir.

(Signature waived.)

At this point the further taking of testimony, under the notice hereto attached, was discontinued.

503 State of Missouri,
City of St. Louis—ss.

Central Trust Company of New York et al., Complainants,
Nos. 2354 and 2464. v.
Wabash, St. Louis & Pacific Railway Company et al., Defendants.
The St. Louis, Kansas City & Colorado Railroad Company, Intervenors.

I, James R. Gray, United States Commissioner for the Eastern District of Missouri, hereby certify that the above witnesses, A. S. Haynes, Michael Hines and Warren Decker, were by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that their depositions were taken down in shorhand by Edward A. Haid and afterwards by him transcribed; that by agreement of counsel, the signatures of said witnesses to said depositions, were waived; that said depositions were taken pursuant to the annexed notice, at my office, room No. 342 Custom House, in the City of St. Louis, Missouri, on the 25th day of May, A. D., 1904, beginning at the hour of eleven o'clock in the forenoon; that the parties were represented at the taking of said depositions by their respective counsel as set forth; that the several exhibits recited were marked as specially noted in the foregoing depositions; and that I am not counsel or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof I have hereto set my hand at office in the City of St. Louis, this May 31, 1904.

JAMES R. GRAY,
United States Commissioner at St. Louis, Missouri.

Fees, $9.15 (including carbon copy) paid by Intervenor.

504

St. Louis, Mo., May 27, 1904.

Dear Sir:—Mr. Gray, Clerk of the United States Circuit Court, informs me that the deposition of Roadmaster Haynes and Engineers Hines and Decker will be ready for signing very soon.

It occurs to me that we should waive the signatures of these witnesses to the depositions. If you agree with me, kindly advise by letter, so that it can be filed with the depositions, waiving the signatures.

Yours truly,

W. F. EVANS.

Mr. C. N. Travous,
Attorney at Law, Wabash Railroad Company City.

Mr. W. F. Evans,
General Attorney:

We agree that the signatures of the Roadmaster and Engineers above named may be waived as suggested.

Yours truly,

C. N. TRAVOUS,
Att'y Wabash R. R.

May 30, '04.

Exhibit No. 1—Sheet 1.

THE WA

Road Department,

CHE

REPORT OF LABOR performed on Section No. 1 for Month of Ma

No.	NAMES.	OCCUPATION.	1	2	3	4	5	6	7	8	9
1	C. McLaughlin.....	Laborer.....		½							
2	Thomas Easton.....	Laborer.....			1						
3	John Carroll.....	Laborer.....						1			
4	Barney Mooney.....	Laborer.....									
5	Thomas Hayes.....	Laborer.....									
6	William Riley.....	Laborer.....									
7	Pat Conley.....	Laborer.....									
8	John Martin.....	Laborer.....		1	1	1					

REMARKS:

East of St. Peters.

I CERTIFY that the men named above were employed during th
in the service of The Wabash Western Railway Co.

J. P.

—Sheet 1.

THE WABASH WESTERN RAILWAY CO.

CHECK ROLL NO. .....

erformed on Section No. 1 for Month of May, 1889.

Western Division,
26th District.

OCCUPATION.	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	RATES OF PAY. Days	M'ths	Per Day. D.	C.	Am't Due	
Laborer.....		½								1	1	½	1	1								°										5	°	1	30	6	50
Laborer.....			1									½																				1½		1	30	1	95
Laborer.....						1				1	1	½	1	1	1	1	1	1		1	1	1	1									13½		1	30	17	55
Laborer.....											½	½	1	1	1	1	1	1		1	1	1	1									11		1	30	14	30
Laborer.....													1	1	1	1	1	1		1	1	1	1									10		1	30	13	00
Laborer.....															1	1	1	1		1	1	1	1									8		1	30	10	40
Laborer.....															1	1	1	1		1	1	1	1									8		1	30	10	40
Laborer.....		1	1	1																												3		1	30	3	90
																																60				$78	00

n named above were employed during the time specified,
stern Railway Co.

J. P. KELSO,
Foreman.

Exhibit No. 1—Sheet 2.

Road Department.

THE WABASH WESTERN RAILWAY CO.

CHECK ROLL NO.————

Western Division.

REPORT OF LABOR performed on Section No. 1 for Month of May, 1889.

26th District.

No.	NAMES.	OCCUPATION.	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	RATES OF PAY. Days.	Mos.	Per Day. D.	Per Day. C.	Per Month. D.	Per Month. C.	Amount.		Amt' Due.	
1	J. P. Kelso.....	Foreman.....	1	1	1[2]	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	°1	1	1	1	1	1	1	1	1	1										
2	Ed. Tobin.....	Laborer.....	4	1	1	1	1							1	1	1	1	1	1	1		1	2	1	1									31	°1			60	00	48	39		
3	James Kinney.....	Laborer.....	4	1	1	1	1	1	1	1	1	1	1	1	1	1	2	1	1	1		1	1	1	1									20½		1	30					26	65
4	George Faller.....	Laborer.....	3	1	1	1								½	1	1																		25		1	30					32	50
5	Pat. Kennedy.....	Laborer.....	3	1	1	1								½	1	1																		8½		1	30					11	05
6	Ed. Cullers.....	Laborer.....	1[2]																															8½		1	30					11	05
7	Jno. Sanders.....	Laborer.....	2																															1½		1	30					1	95
8	John O'Neil.....	Laborer	2																															2		1	30					2	60
9	G. C. Dugan.....	Laborer.....	5	1	1	1		1		1				1	1	1	1	1	1	1		1	1	1	1									2		1	30					2	60
10	Peter McDonald.....	Laborer.....	2	1	1	1		1							1																			22		1	30					28	60
11	Joe Donelson.....	Laborer.....	3	1	1[2]	1								1	1	1	1	1	1	1	1	1	1	1	1									7		1	30					9	10
																																		17½		1	30					22	75
																																										$208	85

REMARKS: East of St. Peters.

I CERTIFY that the men named above were employed during the time specified, in the service of The Wabash Western Railway Co.

J. P. KELSO.
Foreman.

Exhibit No. 1—Sheet 3.

THE WABASH WESTERN RAILWAY CO.

Road Department,

CHECK ROLL .....

REPORT OF LABOR performed on Section No. 1 for Month of May, 1889.

Western Division,
26th District.

No.	NAMES.	OCCUPATION.	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Days.	Mos.	Rates of Pay. Per Day. D.	C.	Per Month. D.	C.	Amount.		Del'ctions.		Am't Due.	
1	J. P. Kelso.....	Foreman.....	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1		1				60		00			50		59	5
2	E. I. Tobin.....	Laborer.....	4	1	1[2]	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1		1	2	1	1									26½		1	30			34	45	8	60	35	2
3	James Kinney.....	Laborer.....	4	1	1	1	1	1	1	1	1	1	1	1	1	1	2	1	1	1		1	1	1	1									25		1	30			32	50		35	32	15
4	George Faller.....	Laborer.....	3	1	1	1		1	1	1	1	1	1	½	1	1																		14½		1	30			18	85			18	85
5	Pat. Kennedy.....	Laborer.....	3	1	1	1		1	1	1	1	1	1	½	1	1																		14½		1	30			18	85			19	85
6	E. I. Cullens.....	Laborer.....	1[2]																															1½		1	30			1	95	1	50		45
7	John Sanders.....	Laborer.....	2																															2		1	30			2	60			2	60
8	John O'Niel.....	Laborer.....	2																															2		1	30			2	60	2	00		60
9	G. C. Dugan.....	Laborer.....	5	1	1	1		1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1									26		1	30			33	80		35	33	45
10	Peter McDonald.. ..	Laborer.....	2	1	1	1		1	1	1	1	1	1		1																			12		1	30			15	60	8	40	7	20
11	Joe Donelson.....	Laborer.....	3	1	1[2]	1		1	1	1	1	1	1	1	1	1	1	1	1	1		1	1	1	1									23½		1	30			30	55	13	70	16	85
12	C. McLaughlin.....	Laborer.....		½				1	1	1	1	1	1	½	1	1																		9		1	30			11	70	5	55	6	15
13	Thomas Gaston.....	Laborer.....			1	1		1	1	1	1	1	½																					7½		1	30			9	75			9	75
14	Jno. Carroll.....	Laborer.....						1	1	1	1	1	1	½	1	1	1	1	1	1		1	1	1	1									16½		1	30			21	45	11	60	9	85
15	Barney Mooney.....	Laborer.....											½	½	1	1	1	1	1	1		1	1	1	1									11		1	30			14	30	6	86	7	44
16	Thos. Hayes.....	Laborer.....													1	1	1	1	1	1		1	1	1	1									10		1	30			13	00			13	00
17	William Riley.....	Laborer.....															1	1	1	1		1	1	1	1									8		1	30			10	40	5	10	5	30
18	Pat. Conley.....	Laborer.....															1	1	1	1		1	1	1	1									8		1	30			10	40	5	00	5	40
19	John Martin.....	Laborer.....		1	1	1																												3		1	30			3	90	3	75		15
21	Hospital dues.....																																											2	25
22	Mrs. Annie Ryan, board bill, payable at Ewing ave., St. Louis.....																																											22	51
23	Mrs. Mary Husmann, board bill, payable at Ewing ave., St. Louis.....																																											48	50
																																	220½						$346	65			$346	65

I CERTIFY that the men named above were employed during the time specified, in the service of The Wabash Western Railway Company.

J. P. KELSO,
Foreman.

504d Exhibit 2.

St. Louis, 1-1, 1891.

A. S. Haynes, G. R. M.

Dear Sir: Enclosed herewith please find lengths of all tracks on Section No. 1.

Yours truly,
J. P. KELSO, Foreman.

1-13-1887.

F. H. McGuigan, G. R. M.:

Following is number of tracks and feet on every section:

Boyle Avenue side track, 1,955 ft.; fish bar rail.
Hoyt Metal Works lead, 150 ft.; C. R. M. steel.
St. Louis Shovel Works, lead, 130 ft.; C. R. M. steel.
St Louis Car Wheel Foundry, lead, 100 ft.; Joliet 54 steel.
Junction Switch, lead, 120 ft.; Joliet 54 steel.
Brick Yard Switch, lead, 140 ft.; Joliet 54 steel.
Compton Ave. No. 1 track, 1,645 ft.; fish bar rail.
Compton Ave. No. 2 track, 1,439 ft.; fish bar rail.
Compton Ave. No. 3 track, spur east, 1,000 ft.; Chair Iron.
Summit Ave. No. 1 track, 2,140 ft.; fish bar rail.
Summit Ave. No. 2 track, 2,200 ft.; Chair Iron.
Summit Ave. No. 3 track, 1,250 ft.; Chair Iron.
Summit Ave No. 4 track, 1,150 ft.; fish bar rail.
Summit Ave. No. 5 track, 1,442 ft.; fish bar rail.
Cross-over, 153 ft.; Joliet steel.
22d St. No. 1 track, 1,000 ft.; 4¼ steel.
22d St. No. 2 track, 1,000 ft.; fish bar rail.
22d St. No. 3 track, 1,350 ft.; fish bar rail.
22d St. No. 4 track, spur east, 700 ft.; fish bar rail.
22d St. No. 5 track spur east, 480 ft.; fish bar rail.
22d St. No. 6 track, spur east, 500 ft.; fish bar rail.
22d St. No. 7 track, spur east, 480 ft.; fish bar rail.
Ice House track, spur east, 365 ft.; fish bar rail.
Shot Tower track, spur east, 400 ft.; Chair Iron rail.
Dixon track, 1360 ft.; Joliet steel, 56.
Back Dixon track, 900 ft.; Joliet Steel, 56.
Track on hill at Summit Ave., no name or number, 2,620 feet.

JNO. REAGAN.

504e Exhibit 3.

St. Louis, January 1, 1890.

A. S. Haynes, G. R. M.

Dear Sir: The following is lengths of side tracks on Section No. 1:

Boyle Ave. passing track length, 2,045 ft.; from headblock to headblock. Split switches connected at both ends.

St. Louis Steel & Machine Co. switch, 258 ft. Split switch connected to Boyle Ave. Passing track on east end.

Hoyt Metal Co. switch, spur, 987 ft. Split switch connected at west end to main track.

Mound City Oil & Color Co. switch No. 1, 540 ft. Stub spur connected at west end to Hoyt Metal Co. track.

Mound City Oil & Color Co. No. 2, 225 ft. connected at west end to No. 1, spur stub.

Ice Co. switch, split spur, 663 ft. 183 feet of this track belongs to St. Louis Shovel Co.; is connected at east end to 2d main track.

Kaufman & Wilkinson Lumber Yard switch, 780 ft.; spur split switch to 2d main track; connected at east end.

Tamm Bros. Glue Co. split spur, 540 ft.; connected at east end to main track.

St. Louis Car Wheel Co. spur split switch, 925 ft.; connected at east end to main track.

Hydraulic Press Brick Co., No. 1, 615 ft.; connected to 2d main track at east end, split spur.

Hydraulic Press Brick Co. No. 2, 460 ft.; connected at east end to No. 1 stub spur.

Hydraulic Press Brick Co. No. 3, 375 ft.; stub connected at east end to No. 2.

2 and 3 is stub switches.

Missouri Pacific cut-off switch, 270 ft.; split switch connected west end to main track, east end to Mo. P. Ry.

Ewing Ave. No. 2 track, 2,513 ft.; connected to No. 1 at both ends stub switch.

Ewing Ave. No. 3, 1,180 ft.; connected to No. 2 at both ends, stub switches.

Ewing Ave. No. 4, 990 ft.; connected at both ends to No. 3, stub switches.

Ewing Ave. No. 5, 360 ft.; connected at both ends to No. 4, stub switches.

Dixon track, 2,090 ft.; connected at west end to No. 1, east end to Terminal Ry. at 18th St., stub switch.

Cut-off west 21st St., connected to main track, 170 ft.

Cut-off east 21st St., connected to main track, 170 ft.

Two split switches and 2 stub switches.

Eilerman's Malt House track, 120 ft.; connected to wagon track at east end; stub switches.

No. 3, connected at both ends to No. 2, at 22d street and Jefferson Ave., stub switches, 167 ft.

No. 4, connected at east end to No. 3, stub switches, spur, 790 ft.

No. 5, connected to No. 4 at east end spur switch, 350 ft.

Jefferson Ave. cut-off, main track, split switch No. 1 stub, main track and No. 1. 170 ft.

Jefferson Ave., Nos. 2 and 1 connected, stub switches, 140 ft.

Repair track No. 5, 390 ft.; connected at east end, stub switch connected to No. 2 at 21st St.

Repair track No. 6, connected at east end to No. 5 stub switch spur, 525 ft.

Repair track No. 7, 450 ft.; connected at east end to No. 6 stub switch.

Nelson-Morris Dressed Beef Co. switch 312 ft.; connected to 2d main track at west end spur stub.

Consolidated Coal Co. switch No. 1 split, 15 ft.; connected at east end to 2d main track.

Consolidated Coal Co. No. 2 stub, 510 ft.; connected to No. 1 at east end.

St. Louis Hay Exchange switch, 800 ft.; stub spur connected to Consolidated Coal Co. No. 2 at east end.

Blackmer & Post Sewer Pipe Co., 2,090 ft.; stub spur connected to Compton Ave. No. 1 at went end.

Collier Shot Tower switch at 22d street, 710 ft.; spur stub switch connected at east end to No. 4.

No. 1 track connected to main track, west end length at Compton Ave., split switch, east end to Terminal Ry. Association at 18th street, length, 6,650 ft.

Compton Ave. No. 2 track, 1,533 ft.; connected to No. 1 at both ends, stub switches.

Compton Ave. No. 3 stub spur connected to No. 2 at west end, 1,300 ft.

Compton Ave. No. 4 spur stub switch, connected at west end to No. 3, 990 ft.

Compton Ave. No. 5, spur stub switch, connected to No. 4 at west end to stub switches, 1,486 ft. This is the Frisco track but is used by the Wabash for switching.

Cut-off just west and east of Ewing Ave., 170 ft.; connected to main and No. 1.

Two split switches and 2 stub switches, 170 ft.

Wagon track, connected at west end to No. 7 stub switch, 450 ft.

Pit track, to turn table, stub switch, 215 ft.

Cinder tracks, connected at east end to Pit track stub switch, 290 ft.

Round House track leading from turn table to Round House, No. 1, 280 ft.; No. 2, 280 ft.; No. 3, 280 ft.; No. 4, 280 ft.; No. 5, 140 ft.

505 In the Circuit Court of the United States for the Eastern District of Missouri, Eastern Division.

Central Trust Company of New York et al., Complainants,
Numbers 2357 & 2464. v. In Equity.
Wabash, St. Louis and Pacific Railway Company et al., Defendants.

Consolidated.

In the Matter of the Application and Motion of The St. Louis, Kansas City & Colorado Railroad Company, Intervenor.

Second Partial Agreed Statement of Facts.

An examination of the weekly reports, monthly check rolls, statements, vouchers and other papers in the possession of the Wabash Railroad Company, showing the labor performed and material used monthly in and about the repair, maintenance, and improvement work done on or in connection with what is known as Section One of the Wabash Line, in the City of St. Louis, State of Missouri, covering the period between December 31, 1886, and December 31, 1901, was made, by agreement of parties hereto, by R. W. Andrews, on the part of the Intervenor, and his work afterwards compared and checked over by P. E. Purcell, on the part of the Wabash Railroad Company. The said parties agree only as to the following facts appearing from such examination, as shown by the papers hereinafter specifically referred to, which facts the parties stipulate
506 may be considered, in so far as they may be competent and relevant as part of the facts and testimony in this case.

1. In January, 1889, Three Hundred and Forty-Eight Dollars and Eight Cents ($348.08) was charged by the Wabash Railroad Company for labor on Section One of its line, which included Eighty-five Dollars and Eighty cents ($85.80) for labor done in the construction of new side tracks in said month, and of said amount The St. Louis, Kansas City & Colorado Railroad Company (hereinafter called the Colorado Company) paid Three Dollars and Ninety-eight Cents ($3.98), which amount was computed and apportioned on a wheelage basis, the same as that mentioned in the final decree in the above-entitled principal case; as appears from Wabash Bill No. 11660, for January, 1889, rendered to the Colrado Company, and check roll of William Allen, Section Foreman of the Wabash Company for Section One; and by said William Allen's report on form 287, dated January 14, 1889; and the telegram of J. S. McGuigan, Roadmaster of the Wabash Company, to F. H. McGuigan, General Roadmaster of the Wabash Company, dated January 12, 1899; also by the reports of F. H. McGuigan, General Roadmaster of the Wabash Company, on form 2488, to H. L. Magee, General Superintendent of the Wabash Company, dated Janu-

ary 12, 1889. These documents indicate that this charge was for the construction of side tracts leading to the Consolidated Coal Company, and shown on Exhibit D, attached to the partial agreed statement of facts herein, dated July 13, 1903, as "Maguire Coal Co."

An amount of material was by the Wabash Company used in the construction of said track. For the same period the Wabash Company charged the Colorado Company for certain track material, which was paid by the Colorado Company on the wheelage basis aforesaid; but there is nothing in the bills of the Wabash Company rendered to the Colorado Com-
507 pany to show in what track or tracks the materials so charged for were used, other than is to be inferred from the character of the material so charged, as shown by paragraph twenty-six hereof.

2. In July, 1889, the Wabash Company constructed a second track west of Compton Avenue, known as Consolidated Coal Company track, and shown and marked on said Exhibit D as "Maguire Coal Co.," and also relayed side tracks and switches in yard.

This second track is between Theresa and Ranken Avenues, and north of the Wabash main track. Three Hundred and Fifty-five Dollars and Ten Cents ($355.10) was by the Wabash Company charged for labor on Section One of the Wabash Line, which includes Seventy-four Dollars and Forty Cents $(74.40) for labor rendered in the construction of said second track, and Seventy-three Dollars and Ninety Cents ($73.90) for labor of relaying said side tracks and switches in yard, for July, 1889, of which amounts the Colorado Company paid Eighteen Dollars and Twenty-eight Cents ($18.28), computed upon the aforesaid wheelage basis, as appears from Wabash bill No. 47, for July, 1889, rendered to the Colorado Company, and check roll of J. P. Kelso, Section Foreman of the Wabash Company for Section One, for July, 1889; also by the report of said J. P. Kelso, dated July 26, 1889.

An amount of material was by the Wabash Company used in the construction of said tracks. For the same period the Wabash Company charged the Colorado Company for certain track material, which was paid by the Colorado Company on the wheelage basis aforesaid; but there is nothing in the bills of the Wabash Company rendered to the Colorado Company to show in what track or tracks the materials so charged for were used, other than is to be inferred from the character of the material so charged, as shown by paragraph twenty-six hereof.

508 3. In April, 1891, the Wabash Company lowered the grade and extended the tracks shown and marked on

said Exhibit D as "Mound City P. & C. Co.," and as "M. C. P. & C. Co." Said tracks are south of the Wabash main track and east of Boyle Avenue. Four hundred and Sixty-five Dollars ($465.00) was by the Wabash Company charged for labor on Section One of the Wabash line which includes Fifty-three Dollars and Seventy Cents ($53.70) for labor rendered in the said lowering and extension of said tracks, for April, 1891, of which amount the Colorado Company paid Five Dollars and Seventy-one Cents ($5.71), which was computed upon the wheelage basis aforesaid, as appears from Wabash bill No. 18636, for April, 1891, rendered to the Colorado Company, and from the letter of W. P. Elrod, Extra Gang Foreman of the Wabash Company, to A. S. Haynes, General Roadmaster of the Wabash Company.

An amount of material was by the Wabash Company used in said lowering and extension of said tracks. For the same period the Wabash Company charged the Colorado Company with certain track material, which was paid by the Colorado Company on the wheelage basis aforesaid; but there is nothing in the bills of the Wabash Company rendered to the Colorado Company to show in what track or tracks the materials so charged for were used, other than is to be inferred from the character of the material so charged, as shown by paragraph twenty-six hereof.

4. In June, 1891, the Wabash Company relayed and extended the track shown and marked on said Exhibit D as "Shovel Works." Said track is north of the Wabash main track and east of Sarah Street. Four Hundred and Forty-six Dollars and Ten Cents ($446.10) was by the Wabash Company charged for labor on Section One, of the Wabash line, which includes Fifteen Dollars ($15.00) for labor done in said relaying and extension of said track, for June, 1891, of which
509 amount the Colorado Company paid Two Dollars and Forty-two Cents ($2.42), computed upon the wheelage basis aforesaid; as appears from Wabash bill No. 21170, for June, 1891, rendered to the Colorado Company, and check roll of J. P. Kelso, Section Foreman of the Wabash Company for said Section One, for June, 1891, and from the labor and material statement of said J. P. Kelso to A. S. Haynes, General Roadmaster of the Wabash Company, dated June 6, 1891.

An amount of material was by the Wabash Company used in said relaying extension of said track. For the same period the Wabash Company charged the Colorado Company with certain track material, which was paid by the Colorado Company upon the wheelage basis aforesaid; but there is nothing in the bills of the Wabash Company rendered to the Colo-

rado Company to show in what track or tracks the materials so charged for were used, other than is to be inferred from the character of the material so charged, as shown by paragraph twenty-six hereof.

5. In August, 1891, Five Hundred and Twenty-eight Dollars ($528.00) was by the Wabash Company charged for labor on Section One of the Wabash line, which included Twenty-nine Dollars and Eighty-seven Cents ($29.87) for labor rendered in the construction of new side tracks, for August, 1891, of which amount the Colorado Company paid Five Dollars and Twenty-one Cents ($5.21), computed upon the aforesaid wheelage basis; as appears from Wabash bill No. 23541, rendered to the Colorado Company, for August, 1891, and check roll of J. P. Kelso, Section Foreman of the Wabash Company for said Section One, for August, 1891.

An amount of material was by the Wabash Company used in the construction of said tracks. For the same period the Wabash Company charged the Colorado Company with certain track material, which was paid by the Colorado Com-
510 pany on the aforesaid wheelage basis; but there is nothing in the bills of the Wabash Company rendered to the Colorado Company to show in what track or tracks the materials so charged for were used, other than is to be inferred from the character of the material so charged, as shown by paragraph twenty-six hereof.

6. In September, 1891, Five Hundred and Forty-eight Dollars and Fifteen Cents ($548.15) was by the Wabash Company charged for labor on Section One of the Wabash line, which included Forty-five Dollars ($45.00) for labor rendered in the construction of new side tracks, for September, 1891, of which amount the Colorado Company paid Five Dollars and Ninety-three Cents ($5.93), which was computed upon the wheelage basis aforesaid; as appears from Wabash bill No. 24657, for September, 1891, rendered to the Colorado Company, and check roll of J. P. Kelso, Section Foreman of the Wabash Company for said Section One, for September, 1891.

An amount of material was by the Wabash Company used in the construction of said tracks. For the same period the Wabash Company charged the Colorado Company with certain track material, which was paid by the Colorado Company on the Wheelage basis aforesaid; but there is nothing in the bills of the Wabash Company rendered to the Colorado Company to show in what track or tracks the materials so charged for were used, other than is to be inferred from the character of the material so charged, as shown by paragraph twenty-six hereof.

7. In December, 1891, Six Hundred and Eleven Dollars and Forty-seven Cents ($611.47) was by the Wabash Company charged for labor on Section One of the Wabash line, which included Eighty Dollars and Ninety-five Cents ($80.95) for labor rendered in the construction of new side tracks, for December, 1891, of which amount the Colorado Company paid Six Dollars and Eighty-one Cents ($6.81), computed upon the
511 aforesaid wheelage basis; as appears from Wabash bill No. 28405, for December, 1891, rendered to the Colorado Company, and check roll of J. P. Kelso, Section Foreman of the Wabash Company for said Section One, for December, 1891.

An amount of material was by the Wabash Company used in the construction of said tracks. For the same period the Wabash Company charged the Colorado Company with certain track material, which was paid by the Colorado Company on the aforesaid wheelage basis; but there is nothing in the bills of the Wabash Company rendered to the Colorado Company to show in what track or tracks the materials so charged for were used, other than is to be inferred from the character of the material so charged, as shown by paragraph twenty-six hereof.

8. In November, 1902, the Wabash Company constructed new side tracks in the Compton Avenue Yards of said Company, lying between Grand and Ewing Avenues. One Thousand and Eighty-four Dollars and Forty-five Cents ($1,084.45) was by the Wabash Company charged for labor on Section One of the Wabash line, which included One Hundred and Twenty Dollars and Ninety Cents ($120.90) for labor rendered in the construction of said tracts, for November, 1892, of which amount the Colorado Company paid Eleven Dollars and Forty-nine Cents ($11.49), computed on the aforesaid wheelage basis; as appears from Wabash bill No. 44249, rendered to the Colorado Company, and check roll of T. F. Burke, Section Foreman of the Wabash Company for said Section One, for November, 1892.

9. In December, 1892, the Wabash Company constructed new side tracks in the Compton Avenue Yards of said Company, lying between Grand and Ewing Avenues. Eleven Hundred and Twenty-four Dollars and Thirty-three Cents ($1,124.-
33) was by the Wabash Company charged for labor on
512 Section One of the Wabash line, which included Two Hundred and Seventy-eight Dollars and Ninety-eight Cents ($278.98) for labor rendered in the construction of said tracks, for December, 1892, of which amount the Colorado Company paid Twenty-three Dollars and Forty-one Cents ($23.41), which was computed on the aforesaid wheelage basis; as appears from Wabash bill No. 45316, rendered to the Colo-

rado Company, and check roll of T. F. Burke, Section Foreman of the Wabash Company for Section One, for December, 1892.

10. In March, 1893, the Wabash Company extended the track east of Boyle Avenue, on the south side of the Wabash main track, shown and marked on said Exhibit D as "Hoyt Metal Co." Four Hundred and Seventy-one Dollars and Fifty Cents ($471.50) was by the Wabash Company charged for labor on Section One of the Wabash line, which included Sixteen Dollars and Eighteen Cents ($16.18) for labor rendered in extending said track, for March, 1893, of which amount the Colorado Company paid One Dollar and Thirty-five Cents ($1.35), computed upon the aforesaid wheelage basis; as appears from Wabash bill No. 50787, rendered to the Colorado Company, and check roll of T. F. Burke, Section Foreman of the Wabash Company for said Section One, for March, 1893.

11. In May, 1893, the Wabash Company repaired the wagon track in the Compton Avenue Yards of the Wabash Company, lying between Grand and Ewing Avenues. Eight Hundred and Ninety Dollars and Ten Cents ($890.10) was by the Wabash Company charged for labor on said Section One of the Wabash line, which included Fifty-nine Dollars and Eighty Cents ($59.80) for labor rendered in making said repairs, for May, 1893, of which amount the Colorado Company paid Six Dollars and Ninety-nine Cents ($6.99), computed on the aforesaid wheelage basis; as appears from Wabash bill No. 54026, rendered to the Colorado Company, and check roll of T.
513 F. Burke, Section Foreman of the Wabash Company, for said Section One, for May, 1893.

12. In July, 1893, Five Hundred and Twenty-one Dollars and Thirty Cents ($521.30) was charged by the Wabash Company for labor on Section One of the Wabash line, which included One Hundred and Seventy-two Dollars and Ninety-five Cents ($172.95) for labor rendered in constructing new side tracks, for July, 1893, of which amount the Colorado Company paid Twenty Dollars and Sixty Cents ($20.60), computed on the aforesaid wheelage basis; as appears from Wabash Bill No. 57106, rendered to the Colorado Company, and check roll of J. Reagan, Section Foreman of the Wabash Company for said Section One, for July, 1893; also from reports of said J. Reagan on form 940, dated July 6, July 20, and July 30, 1893.

An amount of material was by the Wabash Company used in the construction of said tracks. For the same period the Wabash Company charged the Colorado Company with certain track material, which was paid by the Colorado Company on

the aforesaid wheelage basis; but there is nothing in the bills of the Wabash Company rendered to the Colorado Company to show in what track or tracks the materials so charged for were used, other than is to be inferred from the character of the material so charged, as shown by paragraph twenty-six hereof.

13. In July, 1893, the Wabash Company charged the sum of Two Hundred and Eighty-six Dollars and Thirty Cents ($286.30) for expenses in constructing new side tracks during the previous month, of which amount the Colorado Company paid Thirty-six Dollars and Twenty-seven Cents ($36.27), computed on the aforesaid wheelage basis.

14. In August, 1893, the Wabash Company constructed New Scale Track No. 1, in the Ewing Avenue Yards of said Company. Four Hundred and Nine Dollars and Fifty
514 Cents ($409.50) was charged by the Wabash Company for labor on said Section One of the Wabash line, which included Twenty-nine Dollars and Five Cents ($29.05) for labor rendered in the construction of said track; as appears from Wabash bill No. 58478, rendered to the Colorado Company, and check roll of J. Reagan, Section Foreman of the Wabash Company for said Section One, for August, 1893.

An amount of material was by the Wabash Company used in the construction of said tracks. For the same period the Wabash Company charged the Colorado Company with certain track material, which was paid by the Colorado Company on the aforesaid wheelage basis; but there is nothing in the bills of the Wabash Company rendered to the Colorado Company to show in what track or tracks the materials so charged for were used, other than is to be inferred from the character of the material so charged, as shown by paragraph twenty-six hereof.

15. In December, 1893, Three Hundred and Fifty-nine Dollars and Fifty Cents ($359.50) was by the Wabash Company charged for labor on said Section One of the Wabash line, which included Three Hundred and Fifty-nine Dollars and Fifty Cents ($359.50) for labor rendered in constructing certain side tracks at Ewing Avenue, for December, 1893, of which amount the Colorado Company paid Twenty-five Dollars and Forty-seven Cents ($25.47), computed upon the aforesaid wheelage basis; as appears from Wabash bill No. 63306, rendered to the Colorado Company, and check roll of W. W. Woodin, Section Foreman of the Wabash Company for said Section One, for December, 1893.

An amount of material was by the Wabash Company used in the construction of said tracks. For the same period the Wa-

bash Company charged the Colorado Company with certain track material, which was paid by the Colorado Com-
515 pany on the aforesaid wheelage basis; but there is nothing in the bills of the Wabash Company rendered to the Colorado Company to show in what track or tracks the materials so charged for were used, other than is to be inferred from the character of the material so charged, as shown by paragraph twenty-six hereof.

16. In February, 1895, the Wabash Company repaired the tracks shown and marked on said Exhibit D as "M. C. P. & C. Co." "Mound City P. & C. Co.," south of the Wabash main tracks and east of Boyle Avenue; "Hydraulic P. Brick Co.," east of Spring Avenue and north of the Wabash main tracks; and "Donk Bros. Coal Co.," north of the Wabash main tracks and east of Manchester Avenue. Two Hundred and Forty-three Dollars and Seventy-four Cents ($243.74) was by the Wabash Company charged for labor on said Section One of the Wabash line, which included Thirty-two Dollars and Sixty-two Cents ($32.62) for labor rendered in making the repairs to said tracks, for February, 1895, of which amount the Colorado Company paid Four Dollars and Eighty-five Cents ($4.85), computed upon the aforesaid wheelage basis; as appears from Wabash bill No. 83530, rendered to the Colorado Company, and check roll of J. Reagan, Section Foreman of the Wabash Company for said Section One, for February, 1895.

An amount of material was by the Wabash Company used in making the repairs to said tracks. For the same period the Wabash Company charged the Colorado Company with certain track material, which was paid by the Colorado Company on the aforesaid wheelage basis; but there is nothing in the bills of the Wabash Company rendered to the Colorado Company to show in what track or tracks the materials so charged for were used, other than is to be inferred from the character of the material so charged, as shown by paragraph twenty-six hereof.

17. In May, 1895, Three Hundred and Fifty-three Dol-
516 lars and Seventy-five Cents ($353.75) was charged by the Wabash Company for labor on said Section One of the Wabash line, which included Twelve Dollars and Twenty-five Cents ($12.25), for labor rendered in constructing new side tracks, for May, 1895, of which amount the Colorado Company paid Two Dollars and Seventy-nine Cents ($2.79), computed on the aforesaid wheelage basis; as appears from Wabash bill No. 88690, rendered to the Colorado Company, and check roll of J. Reagan, Section Foreman of the Wabash Company, for said Section One, for May, 1895.

An amount of material was by the Wabash Company used in the construction of said side tracks. For the same period the Wabash Company charged the Colorado Company with certain track material, which was paid by the Colorado Company on the aforesaid wheelage basis; but there is nothing in the bills of the Wabash Company rendered to the Colorado Company to show in what track or tracks the materials so charged for were used, other than is to be inferred from the character of the material so charged, as shown by paragraph twenty-six hereof.

18. In October, 1895, Three Hundred and Forty-five Dollars ($345.00) was by the Wabash Company charged for labor on Section One of the Wabash line, which included Thirty-two Dollars and Forty-five Cents ($32.45) for labor rendered in constructing new side tracks, for October, 1895, of which amount the Colorado Company paid Six Dollars and Forty-two Cents ($6.42), computed on the aforesaid wheelage basis, as appears from Wabash bill No. 96035, rendered to the Colorado Company, and check roll of J. Reagan, Section Foreman of the Wabash Company for said Section One, for October, 1895.

An amount of material was by the Wabash Company used in the construction of said tracks. For the same period the Wabash Company charged the Colorado Company with certain track material, which was paid by the Colorado
517 Company on the wheelage basis aforesaid; but there is nothing in the bills of the Wabash Company rendered to the Colorado Company to show in what track or tracks the materials so charged for were used, other than is to be inferred from the character of the material so charged, as shown by paragraph twenty-six hereof.

19. In November, 1896, the Wabash Company extended and constructed tracks shown and marked on said Exhibit D as "Hay Exchange tracks," and connected up the Harrison-Berry track with the "Pacific Warehouse Co." These tracks are situated between Ranken and Theresa Avenues, and on the north side of the Wabash main tracks. Two Hundred and Seventy-eight Dollars and Twelve Cents ($278.12) was by the Wabash Company charged for labor on said Section One of the Wabash line, which included Twenty-eight Dollars and Fifty-five Cents ($28.55) for labor rendered in extending and constructing said tracks, for November, 1896, of which amount the Colorado Company paid Four Dollars and Sixty-nine Cents ($4.69), computed on the aforesaid wheelage basis; as appears from Wabash bill No. 15647, rendered to the Colorado Company, and check roll of J. Reagan, Section Foreman of the Wabash Company for said Section One, for November, 1896.

An amount of material was by the Wabash Company used in extending and constructing said tracks. For the same period the Wabash Company charged the Colorado Company with certain track material, which was paid by the Colorado Company on the aforesaid wheelage basis; but there is nothing in the bills of the Wabash Company rendered to the Colorado Company to show in what track or tracks the materials so charged for were used, other than is to be inferred from the character of the material so charged, as shown by paragraph twenty-six hereof.

20. In January, 1897, the Wabash Company repaired the tracks shown and marked on said Exhibit D as "Donk
518 Bros. Coal Co." Said track is on the north side of the Wabash main tracks, and between Spring and Manchester Avenues. One Hundred and Ninety-seven Dollars and Ninety-seven Cents ($197.97) was by the Wabash Company charged for labor on said Section One of the Wabash line, which included Eight Dollars and Thirty-five Cents ($8.35) for labor rendered in repairing said tracks, for January, 1897, of which amount the Colorado Company paid Ninety-one Cents ($0.91), computed on the aforesaid wheelage basis; as appears from Wabash bill No. 18439, rendered to the Colorado Company, and check roll of J. P. Kelso, Section Foreman of the Wabash Company for said Section One, for January 1897.

An amount of material was by the Wabash Company used in repairing said track. For the same period the Wabash Company charged the Colorado Company with certain material, which the Colorado Company paid on the aforesaid wheelage basis; but there is nothing in the bills of the Wabash Company rendered to the Colorado Company to show in what track or tracks the materials so charged for were used, other than is to be inferred from the character of the material so charged, as shown by paragraph twenty-six hereof.

21. In November, 1897, Two Hundred and Fifty-four Dollars and Forty-three Cents ($254.43) was by the Wabash Company charged for labor on said Section One of the Wabash line, which included Thirty-six Dollars and Fifty Cents ($36.50) for labor rendered in constructing new side tracks, for November, 1897, of which amount the Colorado Company paid Five Dollars and Six Cents ($5.06), computed on the aforesaid wheelage basis; as appears from Wabash bill No. 34787, rendered to the Colorado Company, and check roll of J. P. Kelso, Section Foreman of the Wabash Company for said Section One, for November, 1897. An amount of material was by the Wabash Company used in the construction of said tracks. For the
519 same period the Wabash Company charged the Colorado Company with certain track material, which was

paid by the Colorado Company on the aforesaid wheelage basis; but there is nothing in the bills of the Wabash Company rendered to the Colorado Company to show in what track or tracks the materials so charged for were used, other than is to be inferred from the character of the material so charged, as shown by paragraph twenty-six hereof.

22. In December, 1897, the Wabash Company constructed a new side track, known as Extension Track No. 8. Two Hundred and Fifty-six Dollars and Twenty-one Cents ($256.21) was by the Wabash Company charged for labor on said Section One of the Wabash line, which included Seventy-one Dollars and Twenty-five Cents ($71.25) for labor rendered in constructing said track, for December, 1897, of which amount the Colorado Company paid Six Dollars and Eight Cents ($6.08), computed on the aforesaid wheelage basis; as appears from Wabash bill No. 35951, rendered to the Colorado Company, and check roll of J. P. Kelso, Section Foreman of the Wabash Company, for said Section One, for December, 1897.

An amount of material was used by the Wabash Company in constructing said track. For the same period the Wabash Company charged the Colorado Company with certain track material, which the Colorado Company paid on the aforesaid wheelage basis; but there is nothing in the bills of the Wabash Company rendered to the Colorado Company to show in what track or tracks the materials so charged for were used, other than is to be inferred from the character of the material so charged, as shown by paragraph twenty-six hereof.

23. In January, 1898, the Wabash Company repaired the track shown and marked Exhibit D as "Logwood, Decamp & Co." Said track is north of the Wabash main tracks
520 and between Manchester and Spring Avenues. Two Hundred and Thirty-six Dollars and Eighty-seven Cents ($236.87) was by the Wabash Company charged for labor on said Section One of the Wabash line, which included Thirteen Dollars and Fifteen Cents ($13.15) for labor rendered in repairing said track, for January, 1898, of which amount the Colorado Company paid One Dollar and Four Cents ($1.04), computed upon the aforesaid wheelage basis; as appears from Wabash bill No. 38053, rendered to the Colorado Company, and check roll of J. P. Kelso, Section Foreman of the Wabash Company for said Section One, for January, 1898, and statement of said J. P. Kelso, to T. F. Burke, Roadmaster of the Wabash Company, dated January 10, 1898.

An amount of material was by the Wabash Company used in repairing said track. For the same period the Wabash

Company charged the Colorado Company with certain track material, which was paid by the Colorado Company upon the aforesaid wheelage basis; but there is nothing in the bills of the Wabash Company rendered to the Colorado Company to show in what track or tracks the materials so charged for were used, other than is to be inferred from the character of the material so charged, as shown by paragraph twenty-six hereof.

24. In September, 1898, the Wabash Company repaired the track known as the American Press Brick Company track. Three Hundred and Twenty-eight Dollars and Eight Cents ($328.08) was by the Wabash Company charged for labor on said Section One of the Wabash line, which included Thirteen Dollars and Twenty-five Cents ($13.25) for labor rendered in making said repairs, for September, 1898, of which amount the Colorado Company paid One Dollar and Fifty-seven Cents ($1.57), computed upon the aforesaid wheelage basis; as appears from Wabash bill No. 51955, rendered to the Colorado Company, and check roll of B. Taylor, Section Foreman of the Wabash Company for said Section One, for September,
521 1898.

25. In April, 1899, the Wabash Company constructed the Cinder Pit of said Company at Twenty-second street. Thirty-seven Dollars and Seventy-five Cents ($37.75) was by the Wabash Company charged for labor rendered in constructing said Cinder Pit, of which amount the Colorado Company paid One Dollar and Ninety Cents ($1.90), computed upon the aforesaid wheelage basis; as appears from Wabash bill No. 65728, rendered to the Colorado Company, and check rolls respectively, of J. Reagan and J. Stills, Section Foreman of the Wabash Company for said Section One, for April, 1899.

26. From March, 1887, to December, 1901, excepting the months of April, May, June, July, August, September, October, November, and December, 1888, May and June, 1889, October, 1897, and March 1899, the Wabash Company, in its bills rendered to the Colorado Company, charged it for switch material, exclusive of rails, as shown by Exhibit 1, hereto attached. A detail thereof by months is attached hereto, marked "Exhibit 2." Of the amounts so charged, the Colorado Company paid a proportion of the cost of said material, upon the aforesaid wheelage basis. During the same period the Wabash Company, in its bills rendered to the Colorado Company, charged for rails, as shown in Exhibit 3, hereto attached, and made a part hereof, a detail of which by months is shown by Exhibit

4, also attached hereto; the accounts being kept by making a charge for the rails put in tracks, and crediting the amount with those taken therefrom. Of the charges made for rails, the Colorado Company paid a proportion of the cost of said rails upon the aforesaid wheelage basis.

27. The items aforesaid, numbered, respectively, 16 to 25, inclusive, were involved in the litigation upon the intervening petitions of the Wabash Company in the case entitled
522 Arthur F. Luke et al., Complainants, v. St. Louis, Kansas City & Colorado Railroad Company, Defendant, in Equity, number 3829, pending in this court.

28. It is agreed that either of the parties hereto may introduce in evidence on the hearing hereof, if and so far as the same may be relevant and competent, any or all of the papers hereinabove referred to.

29. Neither party hereto waives the right to question the revelancy or competency of any matters of fact outside of the record in said intervention proceedings, as evidence in this proceeding, but on the contrary expressly reserves the right to object to the admission and consideration of any such matters as evidence in this proceeding, on the ground of irrelevancy or incompetency, anything in this stipulation contained to the contrary notwithstanding.

30. This stipulation as to facts is made for the sole purpose of the hearing of the present controversy, and is not to be used as any admission for any other purpose in any other controversy, and this stipulation shall not prejudice any right or claim of either party hereto, in any other proceeding.

Dated this Sept. 6, 1904.

M. A. LOW,
FRANK HAGERMANN,
W. F. EVANS,
Solicitors for the St. Louis, Kansas City & Colorado Railroad Company.

WELLS H. BLODGETT,
H. S. PRIEST,
C. N. TRAVOUS,
Solicitors for the Wabash Railroad Company.

EXHIBIT NO. 1.

RECAPITULATIO
Material put in Joint Track a

Year.	Complete Switch Sets.		No. Class.	High.	Switch Stands. Pony.	Low.	Ball. Ground.		Center Switch Connect'g. Stands.		Switch Points.		Conn. Rods.		Switch Rods.	Plates.	Gd. Rail Braces.	Frogs. 6	7	9	Frogs.	Frog Bolts.
	Dr.	Cr.	Dr.	Dr.	Dr.	Dr.	Dr.	Dr.	Dr.	Cr.	Dr.	Cr.	Dr.	Cr.	Dr.	Dr.	Dr.	Dr.	Dr.	Dr.	Cr.	Dr.
1887....	1	..	2	..	..	..	..	..	..	..	..	..	4	..	26 rods. 1 set.	..	50	.	3	3	..	..
1888....	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	20	1	1	2	..	10
1889....	..	..	..	4	..	..	..	..	..	..	..	..	13	..	32	..	137	1	0	7	4350 lbs.	30
1890....	4	4	..	8	..	..	1	..	..	5	..	1	16	5	61	..	127	2	0	12	6300 lbs.	137
1891....	7	..	..	23	..	..	1	..	..	..	2	..	24	..	58 rods. 8 sets.	..	32	3	0	15	7850 lbs.	250
1892....	..	..	..	5	..	4	..	..	..	..	..	..	14	..	36	..	675	5	0	8	..	260
1893....	10	..	3	0	0	6	0	6	..	..	3	..	..	..	..	..	52	17 frogs no No.			6650 lbs.	185
1894....	..	..	..	1	0	8	0	4	..	..	10	2180 lbs.	4	..	21	..	140	3 frogs No. N-2.			2250 lbs.	30
1895....	..	..	..	6	0	4	0	3	..	..	19	2860	5	..	27	..	375	0	3	0	1860 lbs.	182
1896....	..	..	..	6	0	0	0	7	..	..	33	5960 1 No. 70	4	..	21 rods. 2 sets.	..	124	0	2	9	10 fgs.	12 60
1897....	3	..	..	..	..	3	0	8	..	2	14	1560	..	..	1 No. 1 5 sets.	3 sets.	80	4	9	11	15 fgs. 2950 lbs.	14 se
1898....	..	..	..	..	0	1	0	0	..	..	8	520	..	..	3 No. 1	..	..	0	6	6	6 fgs. 1950 lbs.	3 se
1899....	..	..	..	1	3	3	0	1	1	1	8	975	..	..	..	..	..	3	4	3	500 lbs.	6 se
1900....	..	..	..	0	2	1	13	2	1	1	13	..	..	..	2 sets.	8 sets.	..	1	7	6	..	26 se
1901....	..	..	..	1	1	0	0	0	..	..	13	..	..	..	1 set.	1 set.	..	1	1	2	1 No. 7.	11 se
Totals ..	25	4	5	55	6	30	15	31	2	9	123	14055 lbs. 2 sw. pts.	84	5	286 rods. 19 sets.	12	1812	20 no No. 21 No. 6. 36 No. 7. 84 No. 9			34660 lbs. 32 fgs.	1144 l 72 s

Filed October 27, 1904. James R. Gray, Clerk.

RECAPITULATION.
terial put in Joint Track and Scrap taken out.

9	Frogs.	Frog Bolts.	Sw'ch Ties. Sets.	Track Ties.	lbs. Angle Bars.	lbs. Splices.	lbs. A Bars Splices.	Nut Locks.	Spikes. lbs.	Bolts. lbs.	Head Chairs.	Guard Rails.	Step Chs. & Splices.	Tie Plates.	Wrought and Cast Iron Credits.
Dr.	Cr.	Dr.	Dr.	Dr.	Dr.	Dr.	Cr.	Dr.	Dr.	Dr.	Dr.	Dr.	Cr. Dr.	Dr.	in lbs.
3	..	..	10	2368	..	3678	..	2600	10900	2600	..	..	.. ..	..	
2	..	10	1	200	..	..	..	..	2600	700	..	..	.. ..	..	
7	4350 lbs.	30	1	2977	..	50067	19767	820	9952	7098	4	..	.. ..	..	18113 lbs. Wrot Scrap.
															1350 " Cast Scrap.
12	6300 lbs.	137	23 ties.	5301	1980	15100	..	1812	22325	6614	21	6 rails.	1800 lbs. ..	..	28287 " Wrot Scrap.
															4685 " Cast Scrap.
15	7850 lbs.	250	2	7296	..	64656	4400	5256	17050	10044	15	..	.. ..	..	62987 " Wrot Scrap.
															8006 " Cast Scrap.
8	..	260	..	952	..	640	..	..	4000	1860	14	..	.. ..	..	7504 " Wrot Scrap.
			21 only.												3263 " Cast Scrap.
No,	6650 lbs.	185	14 sets.	4702	..	35018	2574	2900	16000	7945	..	..	.. 80	..	37090 " Wrot Scrap.
															4468 " Cast Scrap.
o. N-2.	2250 lbs.	30	2 sets.	3705	..	7520	..	500	13435	4077	4	..	.. ..	..	15845 " Wrot Scrap.
															2979 " Cast Scrap.
0	1860 lbs.	182	1 sets.	3054	..	5934	..	1450	8200	2818	..	..	.. ..	..	14181 " Wrot Scrap.
															1735 " Cast Scrap.
9	10 fgs.	12 sets. 60 bts.	7 sets.	3180	..	9274	3000	1950	9200	3200	..	..	.. ..	..	13582 " Wrot Scrap.
															1135 " Cast Scrap.
11	15 fgs. 2950 lbs.	14 sets.	7 sets.	2920	..	8450	..	1900	6700	3350	..	..	.. ..	..	16675 " Wrot Scrap.
															1200 " Cast Scrap.
6	6 fgs. 1950 lbs.	3 sets.	2 sets.	4734	..	..	..	1550	5700	6718	..	..	.. ..	..	7820 " Wrot Scrap.
															150 " Cast Scrap.
3	500 lbs.	6 sets.	9 sets.	3665	..	..	..	2000	9400	3800	..	..	.. ..	4593	9145 " Wrot Scrap.
															1000 " Cast Scrap.
6	..	26 sets.	3 sets.	4611	..	360	..	4400	11600	3800	..	..	.. ..	3354	13711 " Wrot Scrap.
															625 " Cast Scrap.
2	No. 7.	11 sets.	9 sets.	4586	50	706	..	1500	6700	2575	..	..	.. ..	500	7108 " Wrot Scrap.
															215 " Cast Scrap.
	34660 lbs.	1144 bolts.	68sets.	54251	2030	201403	29741	28638	153762	67199	58	6	1800 lbs. 80 lbs.	8447	252048 " Wrot.
7. 84 No. 9	32 fgs.	72 sets.	44 ties.												30811 " Cast.

EXHIBIT 2. SHEET 1.

1887.	Switch Sets.		Switch Points.		Switch Stands.		Conn Rods.		Switch Rods.		Gd. Rail Braces.		Frogs and Nos. 6		7		9		Sets Switch Ties.		Track Ties.		Spikes in lbs.	
	Dr.	Cr.	Dr.	Cr.	Dr.	Cr.	Dr.	Cr.	Dr.	Cr.	Dr.	Cr.	Dr.	Cr.	Dr.	Cr.	Dr.	Cr.	Dr.	Cr.	Dr.	Cr	Dr.	Cr.
January.....	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
February....	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
March.....	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	410	..	80	..
April.....	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	172	..	1800	..
May.....	1	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	2	..	408	..	900	..
June.....	..	..	..	..	1	..	2	..	16	..	28	..	..	..	..	..	..	..	2	..	215	..	800	..
July.....	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	200	..
August.....	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	800	..
September..	..	..	..	..	..	..	2	..	10	..	..	..	..	..	..	..	1	..	4	..	58	..	1200	..
October.....	..	..	..	..	..	..	..	..	..	..	10	..	..	..	..	..	..	..	..	..	30	..	800	..
November ..	..	..	..	..	1	..	..	..	1 set	..	12	..	..	..	..	..	1	..	1	..	394	..	1800	..
December...	..	..	..	..	..	..	..	..	..	..	..	..	..	..	3	..	1	..	1	..	681	..	1800	..
Totals.....	1	..	..	..	2	..	4	..	26 rods. & 1 set.	..	50	..	..	..	3	..	3	..	10	..	2368	..	10900	..

EXHIBIT 2. SHEET 2.

1888.	Frogs and Nos. 6 Dr.	7 Dr.	9 Dr.	Frogs. Cr.	Frog Bolts. Dr.	Sw'h T's. sets. Dr.	Track Ties. Dr.	Gd. Rail Braces. Dr.	Spikes, lbs. Dr.	Bolts. lbs. Dr.	No. Nut Locks. Dr.
January.....	..	1	..	..	..	..	110	..	1000	200	..
February.....	..	..	..	..	..	..	50	..	1000	300	..
March.....	1	..	2	..	10	1	40	20	600	200	..
April.....	Bills Missing										
May.....											
June.....											
July.....											
August.....											
September....											
October.....											
November....											
December....											
Totals.....	1	1	2	..	10	1	200	20	2600	700	..

EXHIBIT 2. SHEET 3.

1889.	Switch Sets. Dr.	Switch Points. Dr.	Switch Stands. High. Dr.	Switch Stands. Pony. Dr.	Switch Stands. Low. Dr.	Conn. Rods. Dr.	Sw'h Rods. Dr.	Gd. Braces. Dr.	Rail Head Chairs. Dr.	Rail Head 6 Dr.	Frogs. 7 Dr.	Frogs. 9 Dr.	Frogs. Cr.	Frog Bolts. Dr.	Lbs. Splices. Dr.	Lbs. Splices. Cr.	Lbs. Spikes. Dr.	Lbs. Bolts. Dr.	No. Nut Locks. Dr.	Switch Ties.	Track Ties.	Wrought and Cast Iron Scrap—credits.
January.....	..	..	..	..	..	..	4	25	..	..	..	..	..	..	980	..	200	420	..	..	..	700 lbs. Wrought Scrap.
February.....	..	..	..	..	..	12	..	15	..	..	..	2	1200 lbs.	..	640	..	1800	480	..	..	17	1500 " " "
March.....	..	..	..	..	..	..	..	..	..	..	..	2	1200 lbs.	..	448	..	440	210	..	..	154	770 " " "
April.....	..	..	..	..	..	..	..	20	..	..	..	..	..	..	1824	..	1012	328	..	..	606	1824 " " "
May.....	Detail bills missing. Wabash Impression Book will supply these.																					
June.....																						
July.....	..	..	..	..	..	..	..	22	..	..	..	..	..	..	..	..	1200	400	..	..	..	950 " " "
														..	1600	..	400	400	..	..		
August.....	..	..	..	..	..	..	..	..	..	..	..	..	..	..	198	..	1200	600	300		900	3100 " " "
September....	..	..	2	..	..	1	6	22	..	..	..	1	600 lbs.	30	330	..	800	400	40	..	..	1289 " " "
															912		200	160		..	80	300 " Cast Scrap.
October.....	..	..	..	..	..	..	4	..	..	1	..	..	350 lbs.	..	19567	11220	1400	1200	..	..	510	1832 " Wrought Scrap.
															1485		600	600				
November....	..	..	..	..	..	..	6	21	..	..	..	..	..	..	20324	8547	600	1200	480	..	220	3290 " " "
																	300				140	2858 " " "
December....	..	..	2	..	..	..	12	12	4	..	..	2	1000 lbs.	..	1759	..	600	400	..	1	350	1050 " Cast Scrap.
Totals.....	..	..	4	..	..	13	32	137	4	1	0	7	4350 lbs.	30	50067	19767	9952	7098	820	1	2977	1350 " Cast Scrap.
																						18113 " Wrought Scrap.

EXHIBIT 2. SHEET 4.

1890.	Complete Sw'h. Dr.	Sw'h Points. Dr.	Switch Stands. High. Dr.	Switch Stands. Ball. Dr.	Sw'h Stands. Cr.	Conn. Rods. Dr.	Sw'h Rods. Dr.	Gd. Rail Braces. Dr.	Head Chairs. Dr.	6 Dr.	Frogs. 7 Dr.	9 Dr.	Frogs. Cr.	Frog. Bolts. Dr.	Sw'h Ties. Dr.	Track Ties. Dr.	lbs. Angle Bars. Dr.	Splices. Dr.	Spikes. Dr.	Bolts. Dr.	Nut Locks. Dr.	Guard Rails. Dr.	Guard Rails. Cr.
January.....	..	..	..	..	..	..	7	35	..	1	..	..	300 lbs.	..	..	98	..	1760	500	282	..	..	..
February.....	..	..	..	..	..	4	6	11	..	..	..	..	..	..	..	4	..	140	100	..			
March.....	..	..	..	..	..	2	6	11	..	..	..	..	..	..	..	50	..	850	500	300	16	..	..
April.....	..	..	..	..	..	..	8	11	..	..	..	2	1000 lbs.	40	..	228	..	..	800	20			
May.....	..	..	..	..	..	..	..	..	..	..	..	1	500 lbs.	..	..	125	..	1248	800	600	40	..	..
June.....	..	..	..	..	..	..	..	..	..	..	..	1	450 lbs.	..	..	360	..	..	..	..			
July.....	..	..	..	..	..	..	..	25	5	..	..	.	..	15	..	150	..	..	1600	400	..	..	..
August.....	..	1 point.	..	..	..	..	6	24	..	..	..	2	900 lbs.	..	..	116	..	..	200	..			
September....	3 No. 70.	Cr. 3 sets swh.'	..	1	..	..	8	..	6	..	..	2	900 lbs.	40	..	400	..	..	11601	1000	1500	..	..
October.....	1 No. 70.	Cr. 1 No. 63. sets sw'h.	5	..	5	Dr.5. Cr. 5	8	..	6	..	..	1	1 No. 9.	30	..	400	..	264	800	600	..	..	..
November....	..	..	..	..	..	..	..	..	..	..	..	1	600 lbs.	12	..	65	..	800	800	300	..	..	..
December....	..	..	3	..	..	5	12	10	4	1	0	2	1200 lbs.	..	..	106	..	1710	800	400	..	6	1800 lbs.
Totals.....	4	5	8	1	5	16 Dr. 5 Cr.	61	127	21	2	0	12	6300 lbs.	137	..	5301	1980	15100 lbs.	22325	6614	1812	6	1800 lbs.

EXHIBIT 2. SHEET 5.

1891.	Complete Switch Sets. Dr.	Switch Points. Dr.	Switch Stands. High. Dr.	Switch Stands. Ball. Dr.	Switch Stands. Cr.	Con. Rods. Dr.	Switch Rods. Dr.	Head Chains. Dr.	Gd. Braces. Dr.	Rail. 6 Dr.	Frogs. 7 Dr.	Frogs. 9 Dr.	Frogs. in lbs. Cr.	Frog Bolts. Dr.	Switch Ties. Dr.	Track Ties. Dr.	Splices, Lbs. Dr.	Splices, Lbs. Cr.	Spikes. Dr.	Bolts. Dr.	No. Nut Locks. Dr.	Wrought & Cast Iron Scrap, Credited.
January.....	..	..	1	..	..	3	..	..	..	..	..	1	450 lbs.	..	..	..	..	..	100	24	..	1136 lbs. Wrought Scrap.
														50	..	300	320	..	600	200	..	215 " Cast Scrap.
February.....	..	..	3	..	..	..	8	3	10	1	..	..	250 lbs.	..	..	40	..	..	..	..	..	1364 " Wrought Scrap.
														50	..	230	800	..	200	..	..	1103 " Cast Scrap.
March.....	..	2	..	..	..	3	6	..	..	..	..	1	1150 lbs.	..	..	60	..	..	150	100	..	870 " Wrought Scrap.
														..	..	50	..	..	800	400		
April.....	..	..	2	..	..	..	6	4	..	..	..	1	450 lbs.	..	..	300	..	..	600	600	..	1761 " Wrought Scrap.
														25	2 sets	150	..	..	800	400	..	830 " Cast Scrap.
May.....	3	..	3	..	..	..	..	..	..	..	..	3	1350 lbs.	..	..	1086	30228	..	1600	2600	2748	3293 " " "
	4	..	5	..	..	..	8	4	10	..	..	4	1850 lbs.	..	..	300	28908	..	2400	2320	2508	18522 " Wrought Scrap.
June.....	..	..	..	..	..	..	..	..	..	..	..	1	450 lbs.	..	..	100	..	..	800	..	..	20704 " " "
														..	..	1200	..	1200	1600	600	..	2450 " " "
July.....	..	..	..	..	..	3	8	..	..	..	..	2	500 lbs.	..	..	300	..	..	1200	..	..	600 " " "
														50	..	950	..	..	800	400	..	1330 " " "
August.....	..	..	3	..	..	5	8 sets	4	..	..	..	..	..	..	..	750	..	..	1600	200	..	550 " " "
														25	..	720	..	3200	800	400	..	5738 " " "
September....	..	..	1	1	..	4	8	..	..	..	..	..	..	..	..	160	..	..	200	..	..	1065 " Cast Scrap.
														50	..	300	..	..	800	400	..	997 " Wrought Scrap.
																						230 " Cast Scrap.
October.....	..	..	1	..	..	6	14	..	12	2	..	..	500 lbs.	..	..	150	2000	..	800	400	..	3473 " Wrought Scrap.
																					..	410 " Cast Scrap.
November....	..	..	3	..	..	..	..	..	..	..	..	2	900 lbs.	..	..	150	2400	..	800	800	..	3044 " Wrought Scrap.
																					..	645 " Cast Scrap.
December....	..	..	1	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	400	200	..	448 " Wrought Scrap.
																					..	215 " Cast Scrap.
Totals.....	7	2	23	1	..	24	58 rods & 8 sets.	15	32	3	..	15	7850 lbs.	250	2 sets	7296	64656	4400	17050	10044	5256	62987 lbs. Wrought Scrap. 8006 " Cast Scrap.

EXHIBIT 2. SHEET 6.

1892.	Switch Stands. High. Dr.	Low. Dr.	Conn. Rods. Dr.	Sw'h Rods. Dr.	Head Chairs. Dr.	Gd. Rail Braces. Dr.	Frogs. 6 Dr.	7 Dr.	9 Dr.	Frogs. Cr.	Frog Bolts. Dr.	Switch Ties. Dr.	Track Ties. Dr.	Splices. lbs. Dr.	Spikes. lbs. Dr.	Bolts. lbs. Dr.	Wrought and Cast Iron Scrap—Credits.
January.....	3	2	8	12	10	100	2	0	2	..	..	..	..	..	200	..	1498 lbs. Wrought Scrap.
																	1945 " Cast Scrap.
February.....	2	2	6	20	..	75	3	0	6	..	200	..	200	..	800	600	3431 " Wrought Scrap.
																	730 " Cast Scrap.
March.....	..	..	..	..	..	..	..	..	..	..	15	..	215	640	100	100	115 " Wrought Scrap.
April.....	..	..	..	..	..	..	..	..	..	..	..	..	35	..	200	100	175 " " "
May.....	..	..	..	4	..	..	..	..	..	..	..	..	72	..	600	200	610 " " "
June.....	..	..	..	..	4	50	..	..	..	..	..	..	40	..	600	200	600 " " "
																	588 " Cast Scrap.
July.....	..	..	..	..	..	..	..	..	..	..	..	..	90	..	600	200	500 " Wrought Scrap.
August.....	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	
September....	..	..	..	..	..	50	..	..	..	..	15	..	200	..	200	200	275 " " "
October.....	..	..	..	..	..	400	..	..	..	..	..	..	110	..	400	200	300 " " "
November....	..	..	..	..	..	..	..	..	..	..	15	..	..	..	100	60	
December....	..	..	..	..	..	..	..	..	..	..	15	..	..	..	200	..	
Totals.....	5	4	14	36	14	675	5	0	8	..	260	..	962	640	4000	1860	7504 " Wrought Scrap.
																	3263 " Cast Scrap.

EXHIBIT 2. SHEET 7.

1893.	Complete Switch Sets. Dr.	Switch Points. Dr.	Switch Stands, High. Dr.	Low. Dr.	Ground. Dr.	Gd. Rail Braces. Dr.	6 Dr.	Frogs. 7 Dr.	9 Dr.	Frogs, in Lbs. Cr.	Frog Bolts. Dr.	Switch Ties, Sets. Dr.	Track Ties. Dr.	Splices. Lbs. Dr.	Lbs. Spikes. Dr.	Lbs. Bolts. Dr.	Step Chairs Nut Locks. Dr.	and Splices. Dr.	Splices Lbs. Cr.	Wrought and Cast Iron Scrap Credits.
January.....	..	1	..	..	..	12	..	..	..	..	..	..	150	..	600	600	..	..	..	700
														12210	600	740	..	..	..	7370 Lbs. Wrought Scrap.
February.....	..	..	..	..	..	..	..	1	..	..	30	..	..	..	100	..	..	..	..	
														..	400	200	200	..	..	
March—Missing																				
April.....	..	..	..	..	..	..	..	..	..	..	50	21 only	..	..	600	350	..	..	..	525 Lbs. Wrought Scrap.
May.....	..	..	..	..	..	..	..	..	..	..	30	..	..	..	400	..	..	..	..	
June.....	..	..	..	..	..	..	4 No number.	..	..	1200 lbs.	..	4	565	..	800	400	500	..	..	660 " Wrought Scrap.
																		..		2500 " Wrought Scrap.
							..	..	..	..	..	..	50	2050	1400	600	700		..	4725 " Wrought Scrap.
July.....	..	..	..	6	..	..	..	..	..	..	20	..	1021	..	200	200	..	..	..	900 " Cast Scrap.
														3820	2200	1069	..	..	..	4450 " Wrought Scrap.
August.	..	..	..	..	..	..	..	..	..	..	30	..	203	4518	900	787	..	..	..	1650 " Wrought Scrap.
September....	..	..	..	..	..	..	3 No Number.	..	..	1350 lbs.	..	..	748	..	1200	600	..	..	..	1880 " Wrought Scrap.
							..	..	..	..	..	..	140	..	200	..	..	..	..	1970 " Wrought Scrap.
October.....	..	..	..	..	..	..	..	..	..	..	..	..	425	6680	400	200	..	..	2574	300 " Cast Scrap.
November....	..	2	3 No Class.	..	..	..	..	..	..	..	25	..	750	..	1200	800	..	..	..	10660 " Wrought Scrap.
																		40 pair chairs.		3268 " Cast Scrap.
December....	10	..	..	..	6	40	10 No Number	..	..	4100 lbs.	..	10	650	5740	4800	1400	1500	40 step splices.		
			3 No Class.				17 Frogs 1 No. 7					14 sets.								4468 Lbs. Cast Scrap.
Totals.....	10	3	6 Low, 6 Ground,			52	No Number	..		6650 lbs.	185	21 only	4702	35018	16000	7945	2900	80	2574	37090 " Wrought Scrap.

EXHIBIT 2. SHEET 8.

1894.	Switch Points. Dr.	Switch Points. Cr.	Switch Stands. High. Dr.	Switch Stands. Low. Dr.	Switch Stands. Grnd. Dr.	Conn. Rods. Dr.	Switch Rods. Dr.	Head Chairs. Dr.	Gd. Rail Braces. Dr.	Frogs. 6 Dr.	Frogs. 7 Dr.	Frogs. 9 Dr.	No No. Dr.	Frogs. Cr.	Frog Bolts. Dr.	Switch Ties. Dr.	Track Ties. Dr.	Splices lbs. Dr.	Spikes. lbs. Dr.	Bolts. lbs. Dr.	Nut Locks. Dr.	Wrought and Cast Iron Scrap—Credits.
January	..	..	..	..	..	..	..	..	40	..	..	..	2	450 900 lbs.	..	..	..	..	400 100	25 ..	..	650 lbs. Wrought Scrap. Scrap A
February	4	900 lbs.	..	4	..	..	..	..	..	..	..	..	1	450 "	..	..	140	..	200 200	200 ..	..	
March	2	500 lbs.	..	1	..	..	8	4	..	..	..	..	..	..	..	..	90 260	..	600 800	200 ..	.	650 " Wrought Scrap. 295 " Wr'gt, 574 lbs. Cast.
April	..	..	..	..	4	..	4	..	..	..	..	..	..	..	..	..	595 600	..	1200 1200	200 ..	..	1560 " Wrought Scrap.
May	..	..	1	..	..	..	..	..	100	..	..	..	..	..	..	..	340	..	1400 35	160 ..	..	2048 " Wrought Scrap.
June	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	55	736	400 200	400 75	..	1400 " Wrought Scrap.
July	..	..	..	1	..	..	5	..	..	0	0	1	0	..	30	..	150	4608	600	400	..	1233 " Wrought Scrap. 2165 " Cast Scrap.
August	1	..	..	..	..	2	4	..	..	..	..	..	..	..	..	1	450	1280	1400 100	400 ..	..	3405 " Wrought Scrap.
September	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	75	..	1400	800	500	1700 " Wrought Scrap.
October	..	..	..	2	..	2	..	..	..	..	..	..	..	..	..	..	275	..	1400	200	..	1500 " Wrought Scrap. 300 " Cast Scrap.
November	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	1	500	896	800	557	..	1004 " Wrought Scrap.
December	3	780 lbs.	..	..	..	..	..	..	..	0	0	1	0	450 "	.	..	175	..	1000	400	..	1050 " Wrought Scrap.
Totals	10	2180 lbs.	1	8	4	4	21	4	140	2 Frogs No. 9.		3 Frogs no No.		2250 "	30	2	3705	7520	13435	4077	500	15845 " Wrought Scrap. 2979 " Cast Scrap.

EXHIBIT 2. SHEET 9.

1895.	Switch Points. Dr.	Switch Points. Cr.	Switch Stands. High. Dr.	Switch Stands. Low. Dr.	Switch Stands. Grd. Dr.	Conn. Rods. Dr.	Sw'h Rods. Dr.	Gd. Rail Braces. Dr.	6 Dr.	Frogs. 7 Dr.	9 Dr.	Frogs. lbs. Cr.	Frog Bolts. Dr	Sw'h Ties. Dr.	Spikes. lbs. Dr.	Bolts. lbs. Dr.	Nut Locks. Dr.	Track Ties. Dr.	Splices. lbs. Dr.	Wrought and Cast Iron. Scrap—Credits.
January.....	4	lbs.	..	1	..	2	8	..	..	..	..	1040	..	..	400	100	..	..	..	575 lbs. Wrought Scrap.
																				150 " Cast Scrap.
February.....	5.70	1300	..	..	..	..	..	..	..	..	..	..	..	..	200	100	..	300	..	1150 " Wrought Scrap.
March.....	..	..	..	..	2	..	..	35	..	..	..	..	30	..	800	400	..	300	960	1860 " Wrought Scrap.
																				60 " Cast Scrap.
April.....	1.70	260	1	..	..	..	..	..	..	..	..	..	..	..	400	200	200	239	900	1348 " Wrought Scrap.
																				215 " Cast Scrap.
May.....	..	..	1	..	..	..	..	..	..	..	..	..	72	..	800	200	750	375	960	1179 " Wrought Scrap.
June.....	..	..	1	..	..	..	..	..	..	..	..	..	20	..	800	200	..	410	768	1590 " Wrought Scrap.
																				215 " Cast Scrap.
July.....	1.70	260	2	..	..	3	4	..	..	..	..	..	..	..	..	..	..	25	..	372 " Wrought Scrap.
																				430 " Cast Scrap.
August.....	..	..	..	1	..	..	..	40	..	1	..	300	..	..	100	18	..	..	2d hand.	1450 " Wrought Scrap.
													..	1	200	200	..	30	1626	150 " Cast Scrap.
September....	..	..	..	..	..	..	..	100	..	2	..	..	60	..	800	400	500	338	..	800 " Wrought Scrap.
October.....	4	1040	..	1	..	..	..	..	..	..	..	..	..	..	200	..	..	112	2d.	2150 " Wrought Scrap.
													..	..	1400	400	..	550	720	150 " Cast Scrap.
November....	2	..	1	..	1	..	12	200	..	..	..	..	..	..	200	..	..	..	..	1135 " Wrought Scrap.
													..	..	1200	400	..	150	..	215 " Cast Scrap.
December....	2	..	..	1	..	..	3	..	..	..	..	520	..	..	400	..	..	100	..	572 " Wrought Scrap.
													..	..	300	200	..	125	..	150 " Cast Scrap.
Totals.....	Dr. 19 pts.	lbs. Cr. 2860	6	4	3	5	27	375	..	3 No. 7 frogs.	..	1860 lbs. Cr.	182	1	8200	2818	1450	3054	5934	14181 " Wrought Scrap.
																				1735 " Cast Scrap.

EXHIBIT 2. SHEET 10.

1896.	Switch Points. Dr.	Switch Points. Cr.	Switch High. Dr.	Stands, Ground. Dr.	Conn. Rods. Dr.	Switch Rods. Dr.	Head Chairs. Dr.	Gd. Rail Braces. Dr.	6 Dr.	Frogs. 7 Dr.	9 Dr.	Frogs. Cr.	Frog Bolts. Dr.	Switch Ties. Dr.	Track Ties. Dr.	Angle Bars. Dr.	Splices. Dr.	A Bars & Splices. Cr.	Spikes. Dr.	Bolts. Dr.	Nut Locks. Dr.	Wrought and Cast Scrap Credited.
																						408 lbs. Wrought Scrap.
January	4.70	..	1	..	..	4	..	..	..	..	..	..	..	..	..	..	..	..	20	200	..	215 " Cast Scrap.
																					..	3182 " Wrought Scrap.
February	4.70	..	2	4 2d hd	..	..	..	..	..	1	..	..	12 sets.	..	150 cull	..	3450	..	1000	800	..	215 " Cast Scrap.
														..	240 cull	..	..	..	400	..		
March	5.70	1300 lbs.	..	2	..	..	..	..	..	..	..	..	..	..	130	..	576	..	600	100	..	1150 " Wrought Scrap.
														..	230	..	..	..	400	..	..	1048 " Wrought Scrap.
April	..	..	1	..	..	..	..	..	..	1	4	4 No. 9	..	..	750	..	..	..	1000	200	200	215 " Cast Scrap.
												1 No. 7		..	110 cull	..	..	..	..	..	..	1096 " Wrought Scrap.
May	2.70	500 lbs.	..	1	..	4	..	..	..	..	..	..	..	..	220	..	..	..	1000	200	..	60 " Cast Scrap.
														..	180 cull	..	..	..	..	..		
June	4.70	1040 lbs.	..	..	..	..	..	..	..	..	..	..	..	..	40	..	576	..	800	400	200	970 " Wrought Scrap.
July	2.70	520 lbs.	..	..	..	4	..	..	..	..	..	..	..	1	60	..	..	..	800	200	..	900 " Wrought Scrap.
August	2.70	520 lbs.	..	..	2	4	..	100	..	..	..	..	..	..	330	..	1084	..	400	200	..	1420 " Wrought Scrap.
														1	..	..	..	..	200	..	..	1073 " Wrought Scrap.
September	6.00	1560 lbs.	2	..	..	2sets	..	24		..	3	..	..	3	275	..	3188	3000	400	200	250	430 " Cast Scrap.
						3 No. 1.																
October	2.70	520 lbs.	..	..	..	2 No. 1.	..	..	..	..	..	..	..	1	..	..	..	..	200	100	..	260 " Wrought Scrap.
														..	15	..	..	..	200	..		
November	2.70	..	..	..	2	..	..	..	..	..	..	..	60	1	100	..	..	..	800	200	300	1025 " Wrought Scrap.
														..	50 cull	..	..	..	..	..		
December	..	..	..	..	..	..	..	..	..	..	2	5	..	..	100	..	400	..	800	400	1000	1050 " Wrought Scrap.
														..	200	..	..	..	200	..		
Totals	33.00	5960 lbs.	6	7	4	21 rds.	..	124	..	2	9	10	60	7	3180	..	9274	3000	9200	3200	1950	13582 lbs. Wrought Scrap.
						2 sets.				No. 7	No. 9		12 sets									1135 " Cast Scrap.

EXHIBIT 2. SHEET 11.

1897.	Com. Sw'h. Sets. Dr.	Switch Points Dr.	Switch Points Cr.	Switch Stands. Low. Dr.	Switch Stands. Grnd. Dr.	Sw'h Stnds. Cr.	Switch Rods. Dr.	Gd. Rail Braces. Dr.	Sw'h Plates. Dr.	6 Dr.	Frogs. 7 Dr.	9 Dr.	Frogs. Cr.	Frog Bolts. Dr.	Switch Ties. Dr.	Track Ties. Dr.	Lbs. Splices. Dr.	Lbs. Splices. Cr.	Spikes. lbs Dr.	Bolts. lbs. Dr.	Nut Locks. Dr.	Wrought and Cast Iron Scrap—Credits.
January	..	1.70	260 lbs.	..	..	..	..	..	..	..	..	2.70	1150 lbs.	..	..	..	..	..	100	..	400	1250 lbs. Wrought Scrap.
														..	..	40	..	..	600	300		
February	..	2.70	520 lbs.	..	2	..	..	..	..	..	3.70	3.70	3 No. 9								..	450 " Wrought Scrap.
													3 No. 7	..	..	25	450	..	150	200		
March	..	..	..	..	4	..	2 sets.	..	..	1	2	4	4 No. 9								..	450 " Wrought Scrap.
													2 No. 7	..	..	..	..	..	250	250		
													1 No. 6								..	450 " Wrought Scrap.
April	..	..	..	..	..	..	..	..	..	..	..	..	..	6 sets.	1	355	..	..	400	200		
			1.70																		..	500 " Wrought Scrap.
May	..	3.70	520 lbs.	..	1	1 Gd. Throw.	1 No. 1	..	..	0	0	2	2 No. 9	2 sets.	..	..	..	..	400	200	500	300 " Wrought Scrap.
June	..	1.70	260	..	1	1	..	..	..	..	..	..	..	..	..	50	..	..	200	200		
			lbs.			Gd. Throw.							..	..	..	150 cull	..	..	400	..	..	8400 " Wrought Scrap.
July	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	250	8000	..	600	200	..	1450 " Wrought Scrap.
													..	..	..	200	..	..	200	..		
August	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	1100	..	..	1000	400	..	675 " Wrought Scrap.
													..	..	..	..	..	..	400	..		
September	..	..	..	..	..	..	..	..	..	..	..	..		6 sets.	..	300	..	..	600	400		
October—Missing.																						1650 " Wrought Scrap.
November	..	7.70	..	3	..	..	3 sets.	40	3 sets.	0	4.70	0	1050	..	..	200 cull	..	..	..	..	1000	600 " Cast Scrap.
														..	3	100	..	..	800	600	..	1100 " Wrought Scrap.
December	3	..	..	..	..	..	..	40	..	3	0	0	750	..	3	150	..	..	600	400	..	600 " Cast Scrap.
Totals	3	14	1560 lbs. & 1 No. 70.	3	8	2 Gd. Throw.	1 No. 1 5 sets.	80	3 sets.	4	9	11	2950 lbs. & 15 frogs.	14 sets.	7	2920	8450	..	6700	3350	1900	16675 " Wrought Scrap. 1200 " Cast Scrap.

EXHIBIT 2. SHEET 12.

1898.	Switch Points.		Sw.Stds.	Swh.	Frogs.			Frogs.	Frog	Switch	Track	Spikes.	Bolts.	Nut	Wrought and Cast Iron
	Dr.	Cr.	Low. Dr.	Rods. Dr.	6 Dr.	7 Dr.	9 Dr.	Cr.	Bolts. Dr.	Ties. Dr.	Ties. Dr.	lbs. Dr.	lbs. Dr.	Locks. Dr.	Scrap—Credits.
January.....	2.70	520 lbs.	..	3 No. 1	0	3	3	3 No. 7 3 No. 9	..	..	31	400	400	50	475 lbs. Wrought Scrap.
February.....	..	..	..	..	0	2	3	1950 lbs.	..	..	205	400	300	..	850 " " "
March.....	..	..	..	..	..	..	..	..	..	..	100	300	400	..	300 " " "
April.....	..	..	..	..	..	..	..	..	..	..	53	100	..	..	1050 " " "
							..	..	..	..	160	600	900		
May.....	..	..	..	..	..	..	..	..	..	..	1463	1200	..	..	900 " " "
							..	..	..	..	420	200	100		
June.....	..	..	..	..	..	..	..	..	..	..	..	..	468	1000	1200 " " "
							..	..	3 sets	..	225	400	800		
July.....	1.63	..	..	..	..	..	..	..	..	..	141	..	600	..	750 " " "
August.....	..	..	..	..	..	..	..	..	..	..	300	400	..	..	300 " " "
							..	..	..	..	352	100	400		
September....	3.63	..	..	..	..	..	..	..	..	..	302	200	1000	..	720 " " "
October.....	..	..	..	..	0	1	0	..	..	2 sets	201	400	750	..	600 " " "
November....	1.63	..	1	..	..	..	..	..	..	..	541	200	200	500	275 " " "
															150 " Cast Scrap.
December....	1.70	..	..	..	..	..	..	..	..	..	240	800	400	..	400 " Wrought Scrap.
Totals.....	8	520 lbs.	1	3 No. 1	..	6	6	6 frgs.	3 sets	2 sets	4734	5700	6718	1550	7820 " Wrought Scrap.
						No. 7 frgs.	No. 9 frgs. &	1950 lbs.							150 " Cast Scrap.

EXHIBIT 2. SHEET 13.

1899.	Switch Points. Dr.	Switch Points. Cr.	High. Dr.	Switch Pony. Dr.	Stands, Low. Dr.	Ground. Dr.	Center Conn. Dr.	6 Dr.	Frogs, 7 Dr.	9 Dr.	Frogs. Cr.	Frog Bolts. Dr.	Switch Ties. Dr.	Track Ties. Dr.	Spikes, Lbs. Dr.	Bolts, Lbs. Dr.	Tie Plates. Dr.	Nut Locks. Dr.	Wrought and Cast Iron Scrap Credits.
January.....	..	..	..	..	..	..	..	..	..	..	..	2 sets.	..	..	200	200	..	..	150 lbs. Wrought Scrap.
February.....	2.70	475 lbs.	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	
March —Missing. See Wabash Railroad																			
April.....	2.70	500 lbs.	0	0	0	1	..	..	..	..	..	..	..	509	1200	..	1163	..	800 " Wrought Scrap.
													..	35	..	..	..	..	1101 " Wrought Scrap.
May.....	..	..	1	0	0	0	..	..	..	..	..	..	3	1007	1400	200	..	..	150 " Cast Scrap.
													..	..	200	..	..	..	
June.....	..	..	..	..	..	..	..	1	1	..	500 lbs.	..	..	48	600	1400	..	1000	1567 " Wrought Scrap.
													..	50	200	..	300	..	559 " Wrought Scrap.
July.....	1.70	..	..	0	1	0	..	..	..	..	..	..	..	454	600	..	1400	..	
													..	126	400	..	674	..	100 " Cast Scrap.
August.....	..	..	..	..	..	..	..	..	..	..	..	..	2	572	1000	200	996	..	1200 " Wrought Scrap.
																			1225 " Wrought Scrap.
September....	1 70	..	..	..	..	..	1	..	..	..	..	..	4	831	1200	600	..	..	150 " Cast Scrap.
																			1450 " Wrought Scrap.
October.....	..	..	..	2	2	0	..	1	3	2	..	4 sets.	..	186	1600	600	60	1000	450 " Cast Scrap.
																			833 " Wrought Scrap.
November....	..	..	..	..	..	..	..	2	..	0	..	..	..	347	600	400	..	..	260 " Wrought Scrap.
December.....	2.70	..	0	1	..	..	..	0	..	1	..	..	..	..	200	200	..	..	150 " Cast Scrap.
Totals.....	8	975 lbs.	1	3	3	1	1	3	4	3	500 lbs.	6 sets.	9 sets.	3665	9400	3800	4593	2000	9145 lbs. Wrought Scrap.
							Center. Conn.												1000 " Cast Scrap.

EXHIBIT 2. SHEET 14.

1900.	Switch Points. Dr.	Switch Stands. Pony. Dr.	Low. Dr.	Ball. Dr.	Grd. Dr.	Center Conn. Dr.	Switch Rods. Dr.	6 Dr.	Frogs 7 Dr.	9 Dr.	Frogs. Cr.	Frog Bolts. Dr.	Sw. Plates. Dr.	Sw. Ties. Dr.	Track Ties. Dr.	Splices. lbs. Dr.	Spikes. lbs. Dr.	Bolts. lbs. Dr.	Nut Locks. Dr.	Tie Plates. Dr.	Wrought and Cast Iron Scrap—Credited.
January.....	2.70	..	1	2	..	..	..	..	..	2	..	..	..	..	104	..	..	..	..	..	200 lbs. Cast Scrap.
														..	130 2d hd.	..	800	400	1000	..	1000 " Wrought Scrap.
February.....	2.70	..	..	..	2	1	1	..	..	..	..	..	..	..	..	..	400	400	500	..	300 " Cast Scrap.
March	..	..	..	..	..	..	..	..	..	..	..	2 sets	2 sets	1 set	121	360 old	600	400	500	200	1000 " Wrought Scrap.
April.....	1.70	..	..	6	..	..	..	..	1	..	..	6 sets	..	..	237	..	600	400	500	..	716 " Wrought Scrap.
May.....	2.70	..	..	1	..	..	1 set	..	..	..	..	6 sets	3 sets	..	130	..	..	..	..	..	635 " Wrought Scrap.
														..	175 cull	..	1000	400	500	..	
June.....	1.70	..	..	..	..	..	..	..	..	..	..	..	..	..	205 cull	..	..	..	..	..	900 " Wrought Scrap.
														..	244	..	800	400	..	..	
July.....	..	..	..	..	..	..	..	..	1	..	..	..	..	..	65		200	200	..	..	650 " Wrought Scrap.
August.....	1.70	..	..	..	..	..	..	..	..	1	1 No. 9	..	..	..	..	..	400	..	..	..	3250 " Wrought Scrap.
														..	302	..	600	200	..	2704	
September....	1.70	..	..	..	..	..	..	..	..	..	..	..	..	..	565	..	..	..	..	..	1550 " Wrought Scrap.
														..	107 cull	..	1400	200	100	..	
October.....	..	1	..	1	..	..	..	..	2	2	..	12 sets	2 sets	..	242—537	..	400	..	..	..	1260 " Wrought Scrap.
														1 set	131 cull	..	1600	200	1000	..	125 " Cast Scrap.
November....	2.70	1 old	..	11	..	..	..	1	3	0	..	..	..	..	671	..	400	..	..	..	1800 " Wrought Scrap.
														..	242 cull	..	1800	400	..	..	
December....	1.70	..	..	3	..	..	..	..	1	1	..	..	1 set 70	..	300	..	..	..	..	..	950 " Wrought Scrap.
														1 set	103	..	600	200	300	450	
Totals.....	13	2	1	13	2	1	2 sets	1	8	6	1	26 sets	8 sets	3 sets	4611	360	11600	3800	4400	3354	13711 " Wrought Scrap.
																					625 " Cast Scrap.

EXHIBIT 2. SHEET 15.

1901.	Switch Points. Dr.	Switch Stands. High. Dr.	Switch Stands. Pony. Dr.	Switch Rods. Dr.	Frogs. 6 Dr.	Frogs. 7 Dr.	Frogs. 9 Dr.	Frogs. Cr.	Frog Bolts. Dr.	Switch Ties. Dr.	Track Ties. Dr.	Angle Bars, lbs. Dr.	Lbs. Splices. Dr.	Lbs. Splices. Dr.	Lbs. Bolts. Dr.	Nut Locks. Dr.	Tie Plates. Dr.	Switch Plates. Dr.	Wrought and Cast Scrap Credited.
January.....	1 No. 63	..	..	..	..	..	..	..	..	..	60 cull								
	3 No. 70	..	..	..	..	..	..	..	..	1	40	..	..	400	200	..	..	..	600 lbs. Wrought Scrap.
															45				
February.....	2 No. 70	..	..	..	..	..	..	..	..	..	60 cull	..	16	600	400	600	500	..	875 " Wrought Scrap.
March.....	2 No. 70	1	..	1 set.	..	..	..	..	..	..	200								1120 " Wrought Scrap.
					..	0	1	..	..	2	152 cull	..	..	1000	200	200	..	1 set	215 " Cast Scrap.
April.....	..	..	..	..	..	1	0	1 No. 7	..	..	..	..	..	100	30	..	..	..	65 " Wrought Scrap.
May.....	..	..	..	..	..	..	..	..	..	..	381	..	..	200	..	..	..	..	
					..	..	..	..	..	2	50 cull	..	..	800	200	..	..	..	798 " Wrought Scrap.
June.....	..	..	1	..	..	..	..	..	..	..	162	..	..	400	..	..	..	..	
					..	..	..	..	3 sets	..	34 cull	20	690	200	200	200	..	..	1200 " Wrought Scrap.
July.....	..	..	..	..	..	..	..	..	..	..	164								
					1	0	0	..	..	..	250	..	..	20	100	..	..	..	200 " Wrought Scrap.
August.....	..	..	..	..	..	..	..	..	..	..	287								
					0	0	1	..	4 sets	2	84 cull	..	..	400	..	..	..	..	450 " Wrought Scrap.
September....	..	..	..	..	..	..	..	..	..	..	181								
					..	..	..	..	..	..	1522 cull	..	..	1400	400	500	..	..	600 " Wrought Scrap.
October.....	4 No. 70	..	..	..	..	..	..	..	..	..	320								
					..	..	..	..	4 sets	2	149 cull	..	..	40	400	..	..	..	200 " Wrought Scrap.
November—Missing. See Wabash Bills.																			
December....	1 No. 70	..	..	..	..	..	..	..	..	..	291								
					..	..	..	..	..	..	199 cull	30	..	600	400	..	..	..	1000 " Wrought Scrap.
Totals.....	13	1 High.	1 Pony	1 Set.	1 No. 6 Frog & 1 No. 7 Frog		2 No. 9 Frogs.	1 No. 7.	11 sets	9	4586	50	706	6700	2575	1500	500	1 set.	7108 lbs. Wrought Scrap 215 " Cast Scrap.

522Q

EXHIBIT 3.

TOTAL NUMBER OF FEET AND WEIGHT OF RAIL CHARGED AND CREDITED.

Year.	In tons. Weight per yard not shown. Dr.	Cr.	110 tons to mile. 70 lb. 96 ft. to ton. Dr.	Cr.	99 tons to mile. 63 lb. 106 2-3 ft. to ton. Dr.	Cr.	94 2-7 tons to mile. 60 lb. 112 ft. to ton. Dr.	Cr.	97 tons to mile. 59 lb. 113 53-57 ft. to ton. Dr.	Cr.	91 1-7 tons to mile. 58 lb. 115 25-29 ft. to ton. Dr.	Cr.	88 tons to mile. 56 lb. 120 ft. to ton. Dr.	Cr.	87 6-7 tons to mile. 55 lb. 122 2-11 ft. to ton. Dr.	Cr.	84 6-7 tons to mile. 54 lb. 124 2-9 ft. to ton. Dr.	Cr.	81 5-7 tons to mile. 52 lb. 129 3-13 ft. to ton. Dr.	Cr.	78 4-7 134 2-5 Dr.
1887	2513 28——2240	1330 24——2240	..	..	1900	340	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
1888	1883 71——2240	2100 69——2240	..	.	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
1889	..	..	16002	240	6290	..	3907	19772	..	..	..	..	5758	7043	..	..	..	..	551	5455	..
1890	..	..	9580	120	..	3200	320	5770	..	..	..	..	9020	2600	500	200	..	200	250	4070	1600
1891	..	..	15255	..	3090	30	1080	120	..	12985	..	..	7985	5190	..	..	..	2290	..	1560	5280
1892	..	..	100	..	..	..	190	..	..	..	..	..	6502	1770	..	..	..	..	..	3932	500
1893	..	..	10180	..	407	..	..	..	..	..	120	..	13967	1820	..	..	..	..	..	17868	..
1894	..	..	..	..	..	..	..	..	..	..	..	..	10026	..	..	..	..	..	..	9096	..
1895	..	..	1020	60	120	..	..	..	..	..	..	..	7360	1350	..	700	..	..	360	5730	..
1896	..	..	986	866	..	120	..	..	..	..	..	..	11390	..	..	..	..	..	..	11540	..
1897	..	..	3890	3410	90	390	..	..	..	..	..	..	180	..	..	..	..	..	..	180	..
1898	..	..	12570	6630	..	5940	..	..	..	..	..	..	60	60	..	..	..	..	..	..	..
1899	..	..	7280	..	2650	..	..	..	..	..	..	..	..	1780	..	6740	..	(53) 360	..	..	..
1900	..	..	612	612	..	..	..	..	..	..	..	..	276	276	..	..	..	..	..	..	..
1901	..	..	30	30	..	..	..	..	..	..	..	..	510	510	..	..	..	..	..	..	..
1902—January to April.																					
Totals	2156 100——2240	1190 94——2240	77505	11968	14547	10020	5497	25662	..	12985	120	..	73034	22399	500	7640	..	2850	1161	59431	7380

See No. 1 Total Drs.....189218 ft. See 2, 28728.
See No. 1 Total Crs.....176768 ft. See 2, 28728.

12450 ft. difference.

CHARGED AND CREDITED.

to mile. lb. to ton. Cr.	87 6-7 tons to mile. 55 lb. 122 2-11 ft. to ton. Dr.	Cr.	84 6-7 tons to mile. 54 lb. 124 2-9 ft. to ton. Dr.	Cr.	81 5-7 tons to mile. 52 lb. 129 3-13 ft. to ton. Dr.	Cr.	78 4-7 tons to mile. 50 lb. 134 2-5 ft. to ton. Dr.	Cr.	75 3-7 tons to mile. 48 lb. 140 ft. to ton. Dr.	Cr.	Section 2. Dr.	Cr.		
..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
7043	..	..	..	..	551	5455	..	..	700	700	750	750		
2600	500	200	..	200	250	4070	1600	1450	..	300	30	30		
5190	..	..	..	2290	..	1560	5280	2265	..	1430	21690	21690		
1770	..	..	..	..	..	3932	500	1082	..	..	90	90		
1820	..	..	..	..	..	17868	..	..	..	3300 1036	1230	1230		
..	..	..	..	..	..	9096	..	..	..	930	..	..		
1350	..	700	..	..	360	5730	..	690	..	360	1530	1530		
..	..	..	..	..	..	11540	..	..	..	..	..	..	..	..
..	..	..	..	..	..	180	..	..	..	..	..	..	..	..
60	..	..	..	..	..	..	..	..	..	..	3120	3120		
1780	..	6740	..	(53) 360	..	..	..	1200	..	..	228	228		
276	..	..	..	..	..	..	..	..	..	..	60	60		
510	..	..	..	..	..	..	..	..	..	..	..	..	..	..
22809	500	7640	..	2850	1161	59431	7380	6687	700	8056	28728	28728		

EXHIBIT 4, SHEET 1.
NUMBER OF FEET AND WEIGHT OF RAIL CHARGED AND CREDITED.

1887 Month.	In tons. Weight per yard not shown. Dr.	Cr.	63 lb. Rail. Dr.	Cr.
March	1213 9—— 2240	1360 8—— 2240	..	..
April	1680 3—— 2240	480 3—— 2240	..	..
May	..	..	2090 17—— 2240	480 3—— 2240
June	120 12—— 2240	860 11—— 2240	..	..
July	1420 1—— 2240	870 1—— 2240	..	..
August	..	..	..	..
September	..	..	..	..
October	320 2——	..	..	No Credits.
November	..	..	..	..
December	..	..	..	..
Totals	2513 28—— 2240	1330 24—— 2240	2090 17—— 2240	480 3—— 2240

Difference charged tons 60-lb. Rail	240 ft.
Difference charged tons 63-lb. Rail	1520 ft.
Total difference in feet charged	1760 ft.

EXHIBIT 4. SHEET 2.
NUMBER OF FEET AND WEIGHT OF RAILS CHARGED AND CREDITED.

1888. Month.		In tons. Weight per yard not shown.	
January		1053 3—— 2240	40 3—— 2240
February		1380 6—— 2240	2060 5—— 2240
March		1690 61—— 2240	61
April	Detail Bills Missing	Wabash Bill No. 6265.	
May		Wabash Bill No. 6757.	
June		Wabash Bill No. 7309.	
July		Wabash Bill No. 7873.	
August		Wabash Bill No. 8449.	
September		..	..
October		..	..
November		..	..
December		..	..
Totals		1883 71—— 2240	2100 69—— 2240

Rail credits O. K.

EXHIBIT 4, SHEET 3.

1889. Month.	70-lb. Dr.	70-lb. Cr.	63-lb. Dr.	63-lb. Cr.	60-lb. Dr.	60-lb. Cr.	56-lb. Dr.	56-lb. Cr	52-lb. Dr.	52-lb. Cr.	50-lb. Dr.	50-lb. Cr.	48-lb. Dr.	48-lb. Cr.	Section 2. 60-lb. Dr.	Section 2. 60-lb. Cr.	Total Feet. Dr.	Total Feet. Cr.
January.....	..	..	3080	..	..	..	..	..	121	3201	..	..	..	..	..	..	3201	3201
February.....	..	..	..	..	1665	..	..	..	430	2095	..	..	..	..	600	600	2695	2697
March.....	..	..	..	..	1142	..	157	1142	..	157	..	..	..	..	30	30	1329	1329
April.....	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
May—Detail Bills Missing.																		
June—Detail Bills Missing.																		
July.....	..	..	..	..	400	400	3200	3200	..	..	..	..	700	700	..	..	4300	4300
August.....	..	..	..	..	300	..	..	300	..	..	..	..	..	..	..	..	300	300
September....	..	..	..	..	400	400	..	..	..	..	..	..	..	..	..	..	400	400
October.....8106		..	3210	..	..	11316	815	815	..	..	..	..	..	..	60	60	12191	12191
November....7656		..	..	..	..	7656	1130	1130	..	..	..	..	..	..	60	60	8846	8846
December.... 240		240	..	..	..	..	456	456	..	..	..	..	..	..	..	..	696	696
Totals..... 16002		240	6290	..	3907	19772	5758	7043	551	5455	..	..	700	700	750	750	33958	33960

Total Rail charged Sec. No. 1, 33208. Sec. No. 2, 750
Total Rail credited Sec. No. 1, 33210. Sec. No. 2, 750
Difference, ——— ———

EXHIBIT 4, SHEET 4. NUMBER OF FEET AND WEIGHT OF RAIL CHARGED AND CREDITED.

1890 Month.	70-lb.		63-lb.		60-lb.		56-lb.		55-lb.		54-lb.		52-lb.		50-lb.		48-lb.		Section No. 2. 63-lb.		Section No. 2. 60-lb.		Total Feet.	
	Dr.	Cr.	Dr.	Cr.	Dr.	Cr.	Dr.	Cr.	Dr.	Cr.	Dr.	Cr.	Dr.	Cr.	Dr.	Cr.	Dr.	Cr.	Dr.	Cr.	Dr.	Cr.	Dr.	Cr.
January	..	..	..	..	..	..	1200	..	..	..	..	..	..	1200	..	..	..	..	..	..	..	..	1200	1200
February	..	..	..	..	..	..	775	775	..	..	..	..	..	..	..	..	..	..	..	..	..	..	775	775
March	..	..	..	..	..	..	1025	1025	..	..	..	..	..	..	..	..	..	..	..	..	..	..	1025	1025
April	..	..	..	..	..	..	720	..	..	..	..	200	..	520	..	..	..	..	..	..	..	..	720	720
May	4810	..	..	..	..	4810	500	500	..	..	..	..	..	..	..	..	..	..	..	..	..	..	5310	5310
June	130	..	..	..	..	..	300 old	..	..	..	..	..	250	250	..	..	..	300	..	..	..	..	680	550
July	3200	..	..	3200	..	..	..	..	..	..	..	..	..	..	700 old	600	..	..	..	..	..	..	3900	3800
August	330	..	..	..	..	..	..	..	50	200	..	..	..	..	300	300	..	..	..	..	..	..	1130	500
September	900	..	..	..	..	900	1200 old	..	..	..	..	..	..	..	..	500	..	..	..	..	..	..	2100	1400
October	..	..	..	..	320	60	2000 old	..	..	..	..	..	..	1500	..	..	..	..	..	..	..	..	2320	1560
November	120	60	..	..	..	..	200	100	..	..	..	..	..	..	600 old	50	..	..	30	30	..	..	950	240
December	90	60	..	..	..	..	1100 old	200	..	..	..	..	..	600	..	..	..	..	..	..	..	..	1190	860
Totals	9580	120	..	3200	320	5770	9020	2600	500	200	..	200	250	4070	1600	1450	..	300	30	30	..	..	21300	17940

Total Rail charged.....21300 ft.
Total Rail credited.....17940 ft.

Difference..... 3360 ft.

EXHIBIT 4. SHEET 5.

NUMBER OF FEET AND WEIGHT OF RAIL CHARGED AND CREDITED.

1891. Month.	70-lb. Dr.	70-lb. Cr.	63-lb. Dr.	63-lb. Cr.	60-lb. Dr.	60-lb. Cr.	59-lb. Dr.	59-lb. Cr.	56-lb. Dr.	56-lb. Cr.	54-lb Dr.	54-lb Cr.	52-lb. Dr.	52-lb. Cr.	50-lb. Dr.	50-lb. Cr.	48-lb. Dr.	48-lb. Cr.	Sec. 2.		Total Feet. Dr.	Total Feet. Cr.
January	..	..	..	..	..	..	..	..	200 old	..	..	..	..	..	550 old	500	..	..	60	60	810	560
February	60	..	30	30	..	..	..	..	..	..	..	..	..	..	600 old	400	..	..	..	..	690	430
March	..	..	..	..	180	..	..	..	..	..	..	..	..	..	530 old	30	..	530	..	..	710	560
April	30	..	..	..	..	..	..	..	840 old	..	..	300	..	340	..	..	..	..	..	..	870	640
May	12985	..	2940	..	..	..	..	12985	300 old	3190	..	..	..	..	400 old	175	..	..	13628	13628	30253	29978
June	..	..	..	..	..	..	..	..	600 old	..	..	..	..	..	400 old	60	..	..	..	..	1000	60
July	90	..	..	..	900	..	..	..	..	..	..	..	..	900	..	..	..	..	..	..	990	900
August	..	..	..	..	..	..	..	..	400	200	..	..	..	..	1500	800	..	..	2662	2662	4562	3662
September	..	..	..	..	..	..	..	..	1200	600	..	..	..	..	400	300	..	..	5340	5340	6940	6240
October	..	..	..	..	..	..	..	..	825	..	..	400	..	..	300 old	..	..	300	..	..	1125	700
November	90	..	..	..	..	..	..	..	1500 old	..	..	1590	..	..	600 old	..	..	600	..	..	2190	2190
December	..	..	120	..	..	120	..	..	2120	1200	..	..	..	320	..	..	..	..	..	..	2240	1640
Totals	13255	..	3090	30	1080	120	..	12985	7985	5190	..	2290	..	1560	5280	2265	..	1430	21690	21690	52380	47560

Total rail charged Sec. No. 1.....30690 ft. Sec. No 2, Dr. 21690.

Total rail credited Sec. No. 1.....25870 ft. Sec. No. 2, Cr. 21690.

Difference..... 4820 ft.

EXHIBIT 4, SHEET 6.

NUMBER OF FEET AND WEIGHT OF RAIL CHARGED AND CREDITED.

1892. Month	70-lb. Dr.	70-lb. Cr.	60-lb. Dr.	60-lb. Cr.	56-lb. Dr.	56-lb. Cr.	52-lb. Dr.	52-lb. Cr.	50-lb. Dr.	50-lb. Cr.	Total Feet. Dr	Total Feet. Cr.
January.....	70	..	..	..	1900 old	..	..	1712	500 old	500	2470	2272
February.....	..	..	..	..	1890	1490	..	..	..	..	1890	1490
March.....	..	..	..	..	1200 old	..	..	1200	..	..	1200	1200
April.....	30	..	..	..	600 old	..	..	630	..	..	630	630
May.....	..	..	..	..	582	..	..	..	..	582	582	582
June.....	..	..	..	..	330	..	..	330	..	..	330	330
July.....	..	..	190 old	..	..	90	..	..	..	..	190	190
August.....	..	..	..	..	..	..	..	..	..	..	..	..
September....	..	..	..	..	..	..	..	..	..	..	..	..
October.....	..	..	..	..	..	..	..	..	..	..	..	..
			sec. 2			sec. 2					sec. 2	sec. 2
November....	..	..	90	..	..	90	..	..	..	..	90	90
December....	..	..	..	..	..	..	..	..	..	..	..	..
Totals.....	100	..	280	..	6502	1770	..	3932	500	1082	7832	6784

Total Rail charged Sec. No. 1.....7292 ft. Sec. 2, 90 ft.
Total Rail credited Sec. No. 1.....6694 ft. Sec. 2, 90 ft.

598 ft.

EXHIBIT 4, SHEET 7. NUMBER OF FEET AND WEIGHT OF RAIL CHARGED AND CREDITED.

1893. Month.	70-lb. Dr.	70-lb. Cr.	67-lb. Dr.	67-lb. Cr.	63-lb. Dr.	63-lb. Cr.	58-lb. Dr.	58-lb. Cr.	56-lb. Dr.	56-lb. Cr.	52-lb. Dr.	52-lb. Cr.	48-lb. Dr.	48-lb. Cr.	45-lb. Dr.	45-lb. Cr.	Total Feet. Dr.	Total Feet. Cr.
January.....	5540	..	..	..	..	..	120 old	..	..	120	..	5540	..	..	..	..	5660	5660
February.....	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
March.....	sec. 2 60	..	..	..	..	sec. 2 60	..	..	..	..	..	..	..	..	..	..	sec 2 60	sec 2 60
April.....	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
May.....	..	..	..	..		..	..	..	..	..	..	..	..	..	..	..	..	..
June.....	1700	..	..	..	..	..	..	..	..	1700	..	..	..	..	..	..	1700	1700
July.....	60	..	..	..	60	..	..	..	3590	..	..	3060	..	..	..	..	3710	3160
August.....	630	..	..	..	347	..	..	..	3641 old	..	..	4618	..	..	..	..	4618	4618
September....	sec. 2 30	sec. No. 2 30	..	..	..	..	..	..	900	..	..	900	..	..	..	..	930	930
October.....	sec. 2 1140	..	..	sec. 2 1140	..	..	..	..	3300	..	..	..	..	..	..	3300	4440	4440
November....	..	..	..	..	..	..	..	..	1036 old	..	..	..	..	1036	..	..	1036	1036
December....	2250	..	..	..	..	..	..	..	1500 old	..	..	3750	..	..	..	..	3750	3750
Totals.....	11410	30	..	1140	407	60	120	..	13967	1820	..	17868	..	1036	..	3300	25904	25254

Total Rail charged Sec. No. 1.....24674 ft. Sec. No. 2, 1230.
Total Rail credited Sec. No. 1.....24024 ft. Sec. No. 2, 1230.

Excess charged..... 650 ft.

EXHIBIT 4. SHEET 8.

NUMBER OF FEET AND WEIGHT OF RAILS CHARGED AND CREDITED.

1894. Month.	56-lb. Dr.	56-lb. Cr.	48-lb. Dr.	48-lb. Cr.	52-lb. Dr.	52-lb. Cr.	Total Feet. Dr.	Total Feet. Cr.
	2d Hand.							
January.....	930	..	..	930	..	..	930	930
	2d Hand.							
February.....	1290	..	..	..	..	1290	1290	1290
	2d Hand.							
March.....	740	..	..	..	..	740	740	740
April.....	300 old	..	..	..	..	300	300	300
May.....	370	..	..	..	..	370	370	370
June.....	476	..	..	..	..	476	476	476
July.....	2710	..	..	..	..	2710	2710	2710
August.....	690	..	..	..	..	690	690	690
September....	750	..	..	..	..	750	750	750
October.....	1050	..	..	..	..	1050	1050	1050
November....	300	..	..	..	..	300	300	300
December....	420	..	..	..	..	420	420	420
Totals.....	10026	..	..	930	..	9096	10026	10026

Total rail charged.....10026 ft.
Total rail credited.....10026 ft.
Difference.....

EXHIBIT 4. SHEET 9.

NUMBER OF FEET AND WEIGHT OF RAIL CHARGED AND CREDITED.

1895. Month	70-lb. Dr.	70-lb. Cr.	63-lb. Dr.	63-lb. Cr.	56-lb. Dr.	56-lb. Cr.	55-lb. Dr.	55-lb. Cr.	52-lb. Dr.	52-lb. Cr.	50-lb. Dr.	50-lb. Cr.	48-lb. Dr.	48-lb. Cr.	Total Feet.	
January	60	60	..	..	570	570	..	..	..	..	..	..	..	..	630	630
February	..	..	..	..	330	..	..	..	..	330	..	..	..	..	330	330
March	..	..	..	..	930	..	..	..	..	930	..	..	..	..	930	930
April	..	..	..	..	570	..	..	..	..	570	..	..	..	..	570	570
May	..	..	120	..	450	120	..	..	..	450	..	..	..	..	570	570
June	660 Sec. 1 1530 Sec. 2	..	..	Sec. 2. 1530	750	660	..	..	..	750	..	..	..	..	2940	2940
July	..	..	..	..	540	..	..	..	360	540	..	..	..	360	900	900
August	..	..	..	..	690	..	..	..	..	..	..	690	..	..	690	690
September	..	..	..	..	600	..	..	..	..	630	..	..	..	..	600	630
October	..	..	..	..	780	..	..	..	..	780	..	..	..	..	780	780
November	..	..	..	..	750	..	..	..	..	750	..	..	..	..	750	750
December	300	..	..	..	400	..	..	700	..	..	..	..	..	..	700	700
Totals	2550	60	120	1530	7360	1350	..	700	360	5700	..	690	..	360	10390	10420

Total rail charged, Sec. 1.....8860 Sec. No. 2.....1530

Total rail credited, Sec. 1.....8890 Sec. No. 2.....1530

EXHIBIT 4, SHEET 10.
NUMBER OF FEET AND WEIGHT OF RAIL CHARGED AND CREDITED.

1896. Month.	70-lb. Dr.	70-lb. Cr.	63-lb. Dr.	63-lb. Cr.	56-lb. Dr.	56-lb. Cr.	52-lb. Dr.	52-lb. Cr.	Total Feet. Dr.	Total Feet. Cr.
January	..	..	..	..	210	..	..	240	210	240
February	..	..	..	..	840	..	..	840	840	840
March	..	..	..	..	300	..	..	300	300	300
April	120	..	..	120	390	..	..	390	510	510
May	..	..	..	..	900 old	..	..	900	900	900
June	..	..	..	..	840 old	..	..	840	840	840
July	..	..	..	..	320 old	..	..	320	320	320
August	..	..	..	..	830	..	..	830	830	830
September	776	776	..	..	600	..	..	600	1376	1376
October	..	..	..	..	360	..	..	360	360	360
November	90	..	..	..	250	..	..	280	340	370
December	..	90	..	..	5550	..	..	5640	5550	5640
Totals	986	866	..	120	11390	..	..	11540	12376	12576

Total Rail charged ..... 12376 ft.
Total Rail credited ..... 12526 ft.

Excess credited ..... 150 ft.

EXHIBIT 4, SHEET 11.

NUMBER OF FEET AND WEIGHT OF RAIL CHARGED AND CREDITED.

1891. Month.	70-lb. Dr.	70-lb. Cr.	65-lb. Dr.	65-lb. Cr.	63-lb. Dr.	63-lb. Cr.	56-lb. Dr.	56-lb. Cr.	52-lb. Dr.	52-lb. Cr.	Total Feet. Dr.	Total Feet. Cr.
January	300	..	..	300	..	..	180	..	..	180	480	480
February	60	60	..	..	30	30	..	..	..	..	90	90
March	480	480	..	..	30	30	..	..	..	..	510	510
April	110	110	..	..	..	..	..	..	..	..	110	110
May	90	90	..	..	..	..	..	..	..	..	90	90
June	60	60	..	..	30	30	..	..	..	..	90	90
July	..	..	..	..	..	..	..	..	..	..	..	..
August	180	..	..	..	..	..	..	..	..	..	180	..
September	90	90	..	..	..	..	..	..	..	..	90	90
October	..	..	..	..	..	..	..	..	..	..	..	Missing
November	1620	20	..	..	..	..	..	..	..	..	1620	1620
December	900	900	..	..	..	..	..	..	..	..	900	900
Totals	3890	3410	..	300	90	90	180	..	..	180	4160	3980

Total feet charged.....4160 ft.
Total feet credited.....3980 ft.

Difference..... 180 ft.

EXHIBIT 4. SHEET 12.

NUMBER OF FEET AND WEIGHT OF RAIL CHARGED AND CREDITED.

1898. Month.	70-lb. Dr.	70-lb. Cr.	63-lb. Dr.	63-lb. Cr.	56-lb. Dr.	56-lb. Cr.	Total Feet. Dr.	Total Feet. Cr.
January.....	300	300	..	..	..	..	300	300
February.....	300	300	..	..	..	..	300	300
March.....	300	300	..	..	..	..	300	300
April.....	5730	5730	..	..	..	..	5730	5730
May.....	..	..	..	..	..	..	..	..
	Sec. 1			Sec. 1				
June.....	5940	..	..	5940	..	..	..	..
	Sec. 2			Sec. 2	Sec. 1			
	3120	..		3120	60	60	9120	9120
July.....	..	..	..	..	..	..	..	..
August.....	..	..	..	..	..	..	..	..
September....	..	..	..	..	..	..	..	..
October.....	..	..	..	..	..	..	..	..
November....	..	..	..	..	..	..	..	..
December....	..	..	..	..	..	..	..	..
Totals.....	15690	6630	..	9060	60	60	15750	15750

Total rail charged, Section No. 1...12630. Section No. 2.....3120.

Total rail credited, Section No. 1...12630. Section No. 2.....3120.

EXHIBIT 4. SHEET 13.

NUMBER OF FEET AND WEIGHT OF RAIL CHARGED AND CREDITED.

1899. Month.	70-lb. Dr.	70-lb. Cr.	63-lb. Dr.	63-lb. Cr.	56-lb. Dr.	56-lb. Cr.	55-lb. Dr.	55-lb. Cr.	53-lb. Dr.	53-lb. Cr.	50-lb. Dr.	50-lb. Cr.	Total Feet. Dr.	Total Feet. Cr.
January	..	..	..	..	..	..	..	..	..	..	..	..	..	..
February	..	..	..	..	..	..	..	..	..	..	..	..	..	..
March	..	..	..	..	..	..	..	..	..	..	..	..	..	..
April	360	..	..	..	..	..	..	..	..	360	..	..	360	360
May	..	..	..	..	..	..	..	..	..	..	..	..	..	..
			sec. 2 180	sec. 2 180										
June	5510	..	2650	..	..	1420	..	6740	..	..	..	..	8340	8340
	sec. 2	sec. 2												
July	48	48	..	..	..	..	..	..	..	..	..	..	48	48
August	..	..	..	..	..	..	..	..	..	..	..	..	..	..
September	..	..	..	..	..	..	..	..	..	..	..	..	..	..
October	210	..	..	..	..	360	..	..	..	..	..	..	210	360
November	..	..	..	..	..	..	..	..	..	..	..	..	..	..
December	1200	..	..	..	..	..	..	..	..	..	..	1200	1200	1200
Totals	7328	48	2830	180	..	1780	..	6740	..	360	..	1200	10158	10308

Total Rail charged Sec. No. 1..... 9930 ft. Sec. No. 2, 228.
Total Rail credited Sec. No. 1..... 10080 ft. Sec. No. 2, 228.

Excess credited..... 150 ft.

EXHIBIT 4, SHEET 14.
NUMBER OF FEET AND WEIGHT OF RAIL CHARGED AND CREDITED.

1900. Month.	70-lb. Dr.	70-lb. Cr.	56 lb. Dr.	56 lb. Cr.	Total Feet. Dr.	Total Feet. Cr.
January....	..	..	126 old	126	126	126
February...	450	450	..	..	450	450
March.....	..	..	..	..	..	..
April.....	..	..	..	..	..	..
May.....	..	..	..	..	..	..
June.....	..	..	150	150	150	150
July.....	..	..	..	..	..	..
August....	..	..	..	..	..	..
September.	162	162	..	..	162	162
	Sec. 2	Sec. 2				
October....	60	60	..	..	60	60
November..	..	..	..	..	..	..
December.	..	..	..	..	..	..
Totals.....	672	672	276	276	948	948

Total rail charged, Sec. 1, 888 ft. Sec 2, 60 ft.
Total rail credited, Sec. 1, 888 ft. Sec. 2, 60 ft.

EXHIBIT 4, SHEET 15.
NUMBER OF FEET AND WEIGHT OF RAIL CHARGED AND CREDITED.

1901. Month.	70-lb. Dr.	70-lb. Cr.	56-lb. Dr.	56-lb. Cr.	Total Feet. Dr.	Total Feet. Cr.
January....	..	..	..	..	..	..
February...	..	..	..	..	..	..
March.....	..	..	..	..	..	..
April.....	..	..	420	420	420	420
May.....	30	30	..	..	30	30
June.....	..	..	90	90	90	90
July.....	..	..	..	..	..	..
August....	..	..	..	..	..	..
September.	..	..	..	..	..	..
October....	..	..	..	..	..	..
November..	..	..	..	..	..	..
December..	..	..	..	..	..	..
Totals	30	30	510	510	540	540

Total rail charged, 540.
Total rail credited, 540.
(Endorsed.)
Filed October 27 1904.

JAMES R. GRAY,
Clerk.

523 Depositions of Emerson, Mitchell and Andrews.

In the Circuit Court of the United States: In and for the Eastern Division of the Eastern Judicial District of Missouri.

Central Trust Company of New York, et al., Complainants,
Numbers 2357 and 2464. vs. In Equity.
Wabash, St. Louis & Pacific Railway Co., et al., Defendants,
St. Louis, Kansas City & Colorado Railroad Company, Intervenor.

Consolidated.

In the Matter of the Application and Motion of the St. Louis, Kansas City & Colorado Railroad Company, Intervenor.

Depositions of witnesses, produced, cautioned, and sworn to testify the whole truth, and carefully examined, on Monday, the twentieth day of March, A. D., 1905, in the above-entitled cause, commencing at the hour of ten o'clock in the forenoon of that day, at the office of W. F. Evans, in rooms 820-821 in the Frisco Building, in the City of St. Louis, State of Missouri, before me, Marie E. Schuerman, a notary public
524 within and for the City of St. Louis, State of Missouri, on the part of the Intervenor, The St. Louis, Kansas City & Colorado Railroad Company, in a certain cause now pending in the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, wherein Central Trust Company, et al, are complainants, and the Wabash, St. Louis & Pacific Railway Company, et al, are defendants, in Equity, numbers 2357 and 2464, Consolidated, in the Matter of the Application and Motion of The St. Louis, Kansas City & Colorado Railroad Company, Intervenor.

Present: Frank Hagerman, Esquire, and W. F. Evans, Esquire, on behalf of The St. Louis, Kansas City & Colorado Railroad Company, Intervenor; C. N. Travous, Esquire, on behalf of The Wabash Railroad Company.

S. T. Emerson, of lawful age, being produced, cautioned, and sworn to testify the whole truth, and carefully examined, deposes and says as follows:

Direct Examination

By Mr. W. F. Evans:

Q. Please state your name and place of residence?

A. S. T. Emerson, Chicago, Illinois.

Q. What is your business, Mr. Emerson?

A. Civil Engineer.

Q. Where you ever connected with the St. Louis, Kansas City & Colorado Railroad Company? A. Yes, sir.

Q. At about what time and at what place?

A. I commenced with them December, '85, and left the service June, '90.

Q. What position did you hold with that Company, Mr. Emerson?

A. I was Chief Engineer, in charge of Surveys and Construction.

Q. During that time were you acquainted with a Mr. H. L. Magee who was connected with the Wabash Company?

A. Yes, sir.

Q. Were you also acquainted with a Mr. Charles M. Hays?

A. Yes, sir.

Q. Mr. Emerson, will you please state whether or not you ever made any agreement or contract with those gentlemen, or either of them, respecting any matters between
525 the Wabash Company and the St. Louis, Kansas City & Colorado Railroad Company?

A. I never did, except in one case.

Q. State what that case was, please?

A. I made an agreement, a written agreement with Mr. Charles M. Hays, about the use of a track that we had built from Forsythe Junction to the north line of Forest Park.

Q. That provided for the movement of the Colorado trains over the Wabash track between Forsythe Junction and the north line of Forest Park, I believe? A. Yes, sir.

Q. Before that time, did you ever make any contract with those gentlemen, or either of them? A. No, sir.

Q. Your attention has been called, has it not, Mr. Emerson, to the evidence of Mr. Magee in this case, in which he refers to a verbal arrangement that was made by you and himself, or Mr. Hays and yourself, respecting the switching of the cars of the Colorado Company of the Wabash track? Did you make any such agreement with either of these gentlemen?

A. Neither with Mr. Magee nor Mr. Hays. You say the switching of the cars. You see there are two kinds of cars, passenger cars and freight cars. Our passenger cars ran into the Union Station at 12th Street, and the Terminal Company's engine took hold of those cars and pushed them onto a side track west of 18th Street.

Q. Mr. Emerson, during the time that you were connected with the St. Louis, Kansas City and Colorado Railroad Company, what was your understanding during that time, as to what tracks the St. Louis, Kansas City and Colorado Railroad Company paid or assisted in paying for the construction and maintenance of, under the decree of December 31st, 1886.

Objected to by Mr. C. N. Travous, as incompetent and improper.

A. All the tracks.

Cross Examination

By Mr. C. N. Travous:

Q. You left the service of the Colorado Company in June, 1890? A. Yes, sir.

526 W. M. Mitchell, of lawful age, being produced, cautioned and sworn to testify the whole truth, and carefully examined, deposes and says as follows:

Direct Examination

By Mr. W. F. Evans:

Q. Will you please state your name and place of residence?

A. W. M. Mitchell, Louisville, Ky.

Q. How long have you lived in Louisville, Mr. Mitchell?

A. Two years and a half.

Q. Did you ever live in St. Louis? A. Yes, sir.

Q. Were you ever connected with the St. Louis, Kansas City and Colorado Railroad Company, Mr. Mitchell? A. Yes, sir.

Q. At what time and at what point?

A. In St. Louis; I took charge of the road on the seventh day of October, 1895, and remained with the road up until—I forget the exact date—but it was between five and six years I was in charge of it, when it was turned over to Francis and Scullin.

Q. What position did you occupy, Mr. Mitchell, with that Company at that time?

A. I was manager under the receivership and was general superintendent for a short period after Mr. Francis and John Scullin took charge of it.

Q. You were general manager or superintendent all the time? A. Yes, sir.

Q. What had you to do, Mr. Mitchell, with the accounts or looking over the bills of the Wabash Company to the Colorado Company for maintenance and construction of the Wabash tracks between 18th Street in this City, and the north line of Forest Park at Union Avenue?

A. I had full charge on the Kansas City and Colorado Road as to the checking and approval of all bills for payment.

Q. Did you frequently go out—state whether or not you did frequently go out over the Wabash line for the purpose of checking over bills and ascertaining where services were rendered?

A. I did so frequently, personally. I also required our roadmaster to make an absolute check of the material that was used and billed for in the maintenance of the track.

Q. At the time that you worked for the Colorado Company, State what the fact is of the Colorado Company paying for its proportion of the maintenance and construction of the
527 Wabash tracks, between the north line of Forest Park and 18th Street?

A. There was never any division made. It was charged to maintenance account whether material was used on the side tracks or the main track.

Q. Do you mean all side tracks, including the industrial tracks?

A. Yes, sir; I found that to be the case, that we were charged for material that even went into the industrial tracks.

Q. And paid for?

A. Yes, sir. That is, I say they were paid for. They were approved for payment, and during the time that I had charge of the road, there was a controversy between the Wabash Company and the St. Louis, Kansas City and Colorado Road, as to the payment of these bills, and the payment on the part of the St. Louis, Kansas City & Colorado road was held up, pending the settlement of the controversy in Court, when the suit was had and the decision rendered, then the whole account was settled, but it was settled without any division of the maintenance question.

Q. So that in the settlement and the payment—

A. The bills were finally paid as to the question of the maintenance and construction of the tracks.

Q. During this litigation that you have spoken of, did you go to Moberly and make any examination of the Wabash books and papers? A. Yes, sir.

Q. State how far back you went in your examination?

A. I went clear back as far as I found any records. I had the bills that had been rendered against the St. Louis, Kansas City and Colorado Road by the Wabash Road for maintenance, from the beginning of the operation.

Q. That is, the operation of the Colorado Road?

A. Yes; Colorado trains over the Wabash tracks, and it was for the purpose of verifying the correctness of the bills rendered as to the quantity of material used and the amount of money that was expended. I found these records in the roadmaster's office. That was, the record of the tracks that had been laid for these industrial purposes. Where in a great many instances they had laid a track and charged "industrial" for it, they laid it for the cost of the track, and then, under contract, they were to pay the cost of maintenance of it, and I
528 found that there was no record there as to the foundation of this maintenance account. They had charged the Colorado Road with the cost of construction of these tracks so far as their records could show, and we had paid the cost of

the tracks and the maintenance of them, so far back as I found the records—

Mr. Travous: I want to object to the foregoing answer of the witness, on the ground that the records mentioned by him would be the best evidence.

Q. That was the suit of Luke vs. The Colorado Road?

A. Yes, sir.

Q. If I understand you correctly, Mr. Mitchell, you say, that during all the time that you worked for the Colorado Company, the Colorado Company paid its proportion to the Wabash Company, for the construction and maintenance of all tracks?

A. Yes, sir.

Q. During that time, what was your understanding as to the Colorado Company paying under the decree of December 31st, 1886, its proportion of the tracks that were constructed by the Wabash Company between 18th Street and the north line of Forest Park?

Objected to by Mr. Travous:

Q. (Continued): That is, whether or not the Colorado Company paid its proportion of all tracks?

Objected to by Mr. Travous, as immaterial.

A. It was my understanding that they should do it. They were liable to use all tracks; they were, therefore, liable to bill for the cost and maintenance of them.

Q. What is your present position, Mr. Mitchell?

A. I am manager of the Kentucky and Indiana Bridge and Railroad Company.

Cross Examination

By Mr. Travous:

Q. When you speak of checking up bills for material and work and maintenance, do you mean that you did that personally, Mr. Mitchell, or that you had your clerks do it?

A. Yes, sir; I either did so myself or had my clerks do it. I always do so wherever I am in charge of property where there is a joint account and joint bill made.

Q. Do you now remember of checking up any bill for material in any industrial track—if so, when, and what in-

529 dustrial track was it?

A. I don't know that I can state the month positively, but I remember of one particular instance when there was a track known as the "Hay Barn Track" and we found some ties that had been charged for, as in this maintenance account, that was pointed out to us by the Wabash section hand as being a part of those that were billed for, and I am positive that dur-

ing that same month there were some ties that were put on a track that was laid to the Centaur Lime Company plant—that same month.

Q. Did you find anything else except ties?

A. There were rails, braces, spikes, etc. General track repairs.

Q. That was all, was it?

A. No, sir; but I couldn't recall all of these instances now.

Q. That is all that you can now recall?

A. No, sir; I found at other times where we were charged for material that went into the maintenance of those coal tracks. There was one long new track that was put in just west of Vandeventer Avenue, just south of the main track, and there was material that was used in the maintenance of the track of the Paint and Color Company on the south side, material that was used in going into the coal tracks—now, I cannot think of the name—just west of Vandeventer Depot on the north side. We found it in all of those tracks. If there was occasion for ties, material, rails, etc., we found them in the side tracks. They billed us frequently for 52-56 relaying rails. Those all went into the side tracks.

Q. And those were for repairs?

A. Yes, sir; I think there were no switches built during the time I was there; I know of no switches having been constructed at the time I was there, except this one track that went into the yards on the south side of the main track, just west of Vandeventer Avenue.

Q. By switches, you mean to include industrial tracks,

A. Yes, sir.

R. W. Andrews, of lawful age, being produced, cautioned and sworn to testify the whole truth, and carefully examined, deposes and says as follows:

530 Direct Examination

By Mr. W. F. Evans:

Q. Please state your name and place of residence?

A. R. W. Andrews; St. Louis.

Q. What is your business, Mr. Andrews?

A. Traveling freight agent for the St. Louis, Kansas City and Colorado Railroad Company.

Q. How long have you been in the employ of the St. Louis, Kansas City and Colorado Railroad Company?

A. Three years.

Q. How long have you been in the employ of the St. Louis, Kansas City and Colorado Company, Mr. Andrews?

A. Three years.

Q. Have you made an examination of certain papers and reports of the Wabash Company respecting the construction

and maintenance of the tracks of that Company in St. Louis, between 18th Street and the north line of Forest Park?

A. Yes, sir.

Q. Did you hear Mr. A. S. Haynes, roadmaster of the Wabash Company, testify in this case? A. Yes, sir.

Q. The reports or exhibits that were attached to his deposition—do you know where they came from?

A. From the roadmaster or superintendent's office, in Moberly.

Q. Do you mean the roadmaster's office?

A. That is where they came from.

Q. Then they are the reports that are filed in the superintendent's or roadmaster's office, of the Wabash Company?

A. Yes, sir.

Q. Did you hear the witness, Mr. Tait, testify in this case for the Wabash Company? A. Yes, sir.

Q. He referred in one of his exhibits as evidence, to an industrial track, known as the Kauffman and Wilkinson track, did he not? Do you know where that track is located?

A. Just west of Cabanne avenue—that is, Spring Avenue now.

Q. On which side of the Wabash main line is this track, Mr. Andrews? A. On the north side.

Q. What tracks, if any, that you know of, lead from that track, Mr. Andrews?

A. As shown on Exhibit "D," I think the Logwood-DeCamp Coal Company's track.

531 Q. Now, the industrial track of Kauffman & Wilkinson referred to a moment ago, that is north of the main line and west of Spring Avenue and east of Manchester Road, I understand? A. Yes, sir.

Q. That is on Exhibit "D," is it not, which is attached to the first partial agreed statement of facts in this case? It is not shown by name?

A. No, sir; it is not shown by name.

Q. On Exhibit "D" what tracks are shown as leading from that track?

A. The Logwood DeCamp and the Centaur Lime Company's track.

Q. Have you a statement showing the wheelage that passed over the main tracks or parts thereof of the Wabash Company?

A. Yes, sir.

Q. Between 18th Street and the north line of Forest Park which is Union Avenue, between certain dates?

A. Yes, sir.

Q. Is this the statement you speak of, Mr. Andrews?

(Statement handed witness by Mr. Evans, and then marked "Exhibit A" for identification, and attached hereto.)

A. Yes, sir.

Q. Is the wheelage shown by this statement made from the bills of the Wabash Company?

A. They were taken from the bills of the Wabash Company.

Q. That begins at what time? Between what points is the wheelage made? If there are any exceptions, please state whether it is not complete, naming the exceptions?

A. This is a statement of wheelage over the tracks of the Wabash Railroad Company, between the north line of Forest Park and 18th Street, the main line and parts thereof, from March, 1887, to and including July, 1902. The wheelage is complete.

Q. Have you also taken that statement and prepared a statement, showing the percentages that is, the number of cars of the per cent of the whole amount of the Wabash Company, and the per cent of the total amount of the Colorado Company, up to that time? A. Yes, sir.

Q. That is attached to the statement?

A. Yes, sir.

532 Cross-Examination Waived.

The Intervenor, The St. Louis, Kansas City and Colorado Railroad Company, produces and offers in evidence the certificate and license issued by the Secretary of State of the State of Missouri, to the St. Louis, Kansas City and Colorado Railroad Company, dated the thirteenth day of January, 1903, a copy of which is marked "Exhibit B" and attached hereto. The defendant, the Wabash Railroad Company, agrees that the copy may be used in lieu of and with the same force and effect as the original, the production of the original being hereby waived.

State of Missouri,
City of St. Louis—ss.

I, Marie E. Schuerman, a Notary Public for the City of St. Louis, State of Missouri, do hereby certify that by agreement of counsel on notice, came before me at the office of W. F. Evans, rooms 820-821 in the Frisco Building, 906 Olive Street, on the twentieth day of March, A. D. 1905, at ten o'clock a. m. of said day, S. T. Emerson, W. M. Mitchell and R. W. Andrews, who were by me cautioned and sworn to testify the whole truth and carefully examined; that their testimony as above set forth was taken by me in shorthand by consent of counsel and afterwards transcribed on the typewriter, and that the signatures of said witnesses to their several depositions was waived by consent of counsel and their depositions are now herewith returned.

I further certify that the said S. T. Emerson is a resident of Chicago, Illinois; that the said W. M. Mitchell is a resident of Louisville, Kentucky, and that the said R. W. Andrews is a resident of the City of St. Louis and State of Missouri. I further certify that the said depositions were retained and kept in my possession until they were, together with the notice for taking same, and the Exhibits attached thereto, by me sealed up and delivered by me to said Court; that I am not of counsel or attorney to either of the parties, nor in-
533 terested in the event of said cause or proceedings; and I further certify that I am duly qualified as a Notary Public and that my term expires on the seventeenth day of February, A. D. 1906.

In testimony whereof I have hereunto set my hand and affixed my notarial seal at the City of St. Louis, in the State of Missouri, this 27th day of March, A. D. 1905.

MARIE E. SCHUERMAN,
Notary Public, City of St. Louis, Mo.

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EXHIBIT A.

STATEMENT OF WHEELAGE over Main Track, or parts thereof, of The Wabash Railroad Company, and its predecessors, between Eighteenth Street, and the North Line of Forest Park, St. Louis, Missouri, from March 7, 1887, to July 31, 1902, used as a basis for dividing maintenance expenses between the above-named companies and The St. Louis, Kansas City & Colorado Railroad Company, under and in pursuance of the Decree of the United States Circuit Court, Eastern District of Missouri, rendered December 31, 1886.

	Year.	Wabash.	St. L., K. C. & C. Co.	Total.
January,	1887			
February	"			
March 7 to 31	"	8889	1151	10040
April	"	9879	959	10838
May	"	10535	1008	11543
June	"	10847	1060	11907
July	"	11997	1065	13062
August	"	12179	1177	13356
September	"	12269	1074	13343
October	"	12653	776	13429
November	"	11404	629	12033
December	"	12842	654	13496
Totals		113494	9553	123047

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	Year.	Wabash.	St. L., K. C. & C. Co.	Total.
January	1888	11047	647	11694
February	"	9465	625	10090
March 7 to 31	"	9745	663	10408
April	"	8760	680	9440
May	"	9684	1316	11000
June	"	9608	1369	10977
July	"	10674	1686	12360
August	"	12518	1635	14153
September	"	12066	1548	13614
October	"	12206	1154	13360
November	"	11582	874	12456
December	"	14161	689	14850
Totals		131516	12886	144402

	Year.	Wabash.	St. L., K. C. & C. Co.	Total.
January	1889	14281	693	14974
February	"	14224	629	14853
March	"	12969	783	13752
April	"	10979	765	11744
May	"	12492	1471	13963
June	"	13042	1575	14617
July	"	12563	1766	14329
August	"	14105	1740	15845
September	"	13043	1493	14536
October	"	15676	1511	17187
November	"	14825	1034	15859
December	"	19008	1075	20083
Totals		167207	14535	181742

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	Year.	Wabash.	St. L., K. C. & C. Co.	Total.
January,	1890	18944	931	19875
February	"	19705	893	20598
March	"	22099	939	23038
April	"	15037	1216	16253
May	"	15802	2091	17893
June	"	17389	2000	19389
July	"	16755	2302	19057
August	"	17663	2207	19870
September	"	14929	1990	16919
October	"	17466	2088	19554
November	"	15296	1909	17205
December	"	14383	1929	16312
Totals		205468	20495	225963

Year.		Wabash.	St. L., K. C. & C. Co.	Total
January	1891	13066	1552	14618
February	"	11583	1435	13018
March	"	13505	1424	14929
April	"	12699	1512	14211
May	"	13733	2441	16174
June	"	12270	2366	14636
July	"	11917	2732	14649
August	"	13084	2766	15850
September	"	14723	2262	16985
October	"	15697	2261	17958
November	"	15365	2261	17626
December	"	17810	1660	19470
Totals		165452	24672	190124

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Year.		Wabash.	St. L., K. C. & C. Co.	Total.
January,	1892	18120	1052	19172
February	"	16355	1112	17467
March	"	14648	1127	15775
April	"	14061	1155	15216
May	"	17155	1225	18380
June	"	17947	1999	19946
July	"	15066	2203	17269
August	"	16869	2550	19419
September	"	16603	2230	18833
October	"	15908	2141	18049
November	"	13946	1464	15410
December	"	15014	1375	16389
Totals		191692	19633	211325

Year.		Wabash.	St. L., K. C. & C. Co.	Total.
January,	1893	15401	1205	16606
February	"	14439	1071	15510
March	"	15655	1384	17039
April	"	14866	1552	16418
May	"	16299	2152	18451
June	"	16823	2440	19263
July	"	15679	2120	17799
August	"	15539	2141	17680
September	"	15423	1974	17397
October	"	16596	1600	18196
November	"	16740	1419	18159
December	"	16606	1266	17872
Totals		190066	20324	210390

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Year.		Wabash.	St. L., K. C. & C. Co.	Total.
January,	1894	13014	1414	14428
February	"	11815	1004	12819
March	"	9326	1511	10837
April	"	8025	1334	9359
May	"	7727	1688	9415
June	"	7250	2092	9342
July	"	6492	2234	8726
August	"	7929	2477	10406
September	"	7895	2116	10011
October	"	7653	2233	9886
November	"	7612	1749	9361
December	"	7982	1534	9516
Totals		102720	21386	124106

Year.		Wabash.	St. L., K. C. & C. Co.	Total
January,	1895	7626	1207	8833
February	"	6600	1154	7754
March	"	6605	1416	8021
April	"	5901	1756	7657
May	"	6118	1819	7937
June	"	6002	2051	8053
July	"	5960	2051	8011
August	"	6799	1844	8643
September	"	6373	1387	7760
October	"	6746	1665	8411
November	"	6396	1472	7868
December	"	5820	1261	7081
Totals		76946	19083	96029

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Year.		Wabash.	St. L., K. C. & C. Co.	Total.
January,	1896	6365	1316	7681
February	"	6222	926	7148
March	"	6404	1582	7986
April	"	6806	1897	8703
May	"	6156	2264	8420
June	"	5856	2232	8088
July	"	6079	1712	7791
August	"	6328	1316	7644
September	"	5384	1109	6493
October	"	6330	1267	7597
November	"	5936	1168	7104
December	"	6311	1048	7359
Totals		74177	17837	92014

Year.		Wabash.	St. L., K. C. & C. Co.	Total.
January,	1897	5858	719	6577
February	"	5066	746	5812
March	"	5959	843	6802
April	"	5646	959	6605
May	"	6358	1354	7712
June	"	6030	1632	7662
July	"	6091	1343	7434
August	"	6028	1395	7423
September	"	6028	848	6876
October	"	6531	1051	7582
November	"	6357	1023	7380
December	"	6219	580	6799
Totals		72171	12493	84664

547

Year.		Wabash.	St. L., K. C. & C. Co.	Total.
January,	1898	5839	503	6342
February	"	5704	504	6208
March	"	6249	595	6844
April	"	6443	496	6939
May	"	6481	707	7188
June	"	6332	1142	7474
July	"	6478	1281	7759
August	"	6821	939	7760
September	"	6934	935	7869
October	"	6826	854	7680
November	"	5928	718	6646
December	"	6038	725	6763
Totals		76073	9399	85472

Year.		Wabash.	St. L., K. C. & C. Co.	Total.
January,	1899	5880	607	6487
February	"	5352	781	6133
March	"	6576	601	7177
April	"	7513	553	8066
May	"	7500	809	8309
June	"	7095	863	7958
July	"	7399	1280	8679
August	"	7964	1372	9336
September	"	7676	981	8657
October	"	7990	1173	9163
November	"	7578	906	8484
December	"	7096	868	7964
Totals		85619	10794	96413

549

Year.		Wabash.	St. L., K. C. & C. Co.	Total.
January,	1900	6977	801	7778
February	"	5978	832	6810
March	"	7414	969	8383
April	"	7138	911	8049
May	"	7435	1277	8712
June	"	7253	1276	8529
July	"	6909	1271	8180
August	"	7376	1436	8812
September	"	8613	1266	9879
October	"	9080	1267	10347
November	"	7490	1212	8702
December	"	8175	1208	9382
Totals		89838	13726	103564

Year.		Wabash.	St. L., K. C. & C. Co.	Total.
January,	1901	7383	1154	8537
February	"	6614	1165	7779
March	"	6728	1165	7893
April	"	7348	1374	8722
May	"	7518	1703	9221
June	"	7349	1792	9141
July	"	7466	1737	9203
August	"	8567	1879	10446
September	"	7851	1703	9554
October	"	8145	2188	10333
November	"	7756	1848	9604
December	"	7165	1766	8931
Totals		89890	19474	109364

551

Year.		Wabash.	St. L., K. C. & C. Co.	Total.
January,	1902	7743	1795	9538
February	"	7334	1694	9028
March	"	8055	2313	10368
April	"	7171	2921	10092
May	"	8341	3309	11650
June	"	9152	3494	12646
July	"	9306	3012	12318
To July, 1902, inclusive		57102	18538	75640

RECAPITULATION.

Period.	Wabash. Wheel-age.	Per Cent.	St. L., K. C. & C. Wheel-age.	Per Cent.	Total Wheel-age.
Mar. 7 to Dec. 31, 1887.	113494	92.24	9553	7.76	123047
Jan. 1 to " " 1888.	131516	91.08	12886	8.92	144402
" " " " 1889.	167207	92.00	14535	8.00	181742
" " " " 1890.	205468	90.93	20495	9.07	225963
" " " " 1891.	165452	87.02	24672	12.98	190124
" " " " 1892.	191692	90.71	19633	9.29	211325
" " " " 1893.	190066	90.34	20324	9.66	210390
" " " " 1894.	102720	82.77	21386	17.23	124106
" " " " 1895.	76946	80.13	19083	19.87	96029
" " " " 1896.	74177	80.61	17837	19.39	92014
" " " " 1897.	72171	85.24	12493	14.76	84664
" " " " 1898.	76073	89.00	9399	11.00	85472
" " " " 1899.	85619	88.80	10794	11.20	96413
" " " " 1900.	89838	86.75	13726	13.25	103564
" " " " 1901.	89890	82.19	19474	17.81	109364
" " " July " 1902.	57102	75.49	18538	24.51	75640
Total.....	1889431	87.71	264828	12.29	2154259

Exhibit B.

553

Copy.

No. 903.

The State of Missouri.

Certificate.

Whereas, The Saint Louis, Kansas City and Colorado Railroad Company, incorporated under the laws of the State of Kansas, has filed in the office of the Secretary of State, duly authenticated evidence of its incorporation, as provided by law, and has, in all respects, complied with the requirements of law governing Foreign Private Corporations.

Now, Therefore, I, Samuel B. Cook, Secretary of State of the State of Missouri, in virute and by authority of law, do hereby certify that said The Saint Louis, Kansas City and Colorado Railroad Company is from the date hereof duly authorized and licensed to do business in the State of Missouri for a term ending December 20th, 1934, and is entitled to all the rights and privileges granted to foreign corporations under the laws of this State, and that the amount of the capital stock of said corporation is twenty million dollars, and the amount of said capital stock represented in the State of Missouri is eight million, four hundred and sixty thousand dollars; one million, six hundred thousand dollars of which were expended in this State when the Act of 1891 went into effect.

In Testimony Whereof, I hereunto set my hand and affix the Great Seal of the State of Missouri. Done at the City of Jefferson this 13th day of January, A. D. nineteen hundred and three.

(Seal) (Signed) SAM B. COOK, Secretary of State.

555 Intervening Petitioners of Wabash Company in Luke Case.

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial? of Missouri.

Central Trust Company of New York et al., Complainants,
Nos. 2357 and 2464. vs. In Equity.
Wabash, St. Louis & Pacific Railway Company, et al., Defendants.

Consolidated.

It is stipulated that a suit was filed by Arthur F. Luke, et al., in this Court against the St. Louis, Kansas City & Colorado Railroad Company in Equity, No. 3829, in which Adiel Sherwood was appointed Receiver on the 14th day of September, 1894, and acted until the 26th day of June, 1901, in which were filed the intervening petitions hereinafter mentioned which the St. Louis, Kansas City & Colorado Railroad Company offer in evidence, the parties consenting that in lieu of certified copies the stenographer may make copies and attach as part of his transcript, the Second Supplemental Intervening Peti-
556 tion filed April 1st, 1898, and the account endorsed: "Intervening Petition of Wabash R. R. Co.," filed April 25th, 1899.

It is further stipulated that either party may introduce on the hearing hereof the above or any other pleading, report decree or part of the records of said suit, subject to any objection as to materiality and relevency.

WELLS H. BLODGETT,
H. S. PRIEST,
C. N. TRAVOUS,
Solicitors for the Wabash Railroad Company.

M. A. LOW,
FRANK HAGERMAN,
W. F. EVANS,
Solicitors for the St. Louis, Kansas City & Colorado Railroad Company.

557 Copy of 2nd Supplemental Intervening Petition of Wabash R. R. Co., Intervenor; Filed April 1st, 1898.

In the Circuit Court of the United States. Eastern Division of the Eastern Judicial District of Missouri.

Arthur F. Luke, et al., Complainants.
No. 3829 vs. In Equity.
St. Louis, Kansas City & Colorado Company and Adiel Sherwood, Receiver, Defendants.
Wabash Railroad Company, Intervenor.

Second Supplemental Petition of the Wabash Railroad Company.

I.

Now comes the Wabash Railroad Company, intervenor, in the above entitled cause, and respectfully states to the court, that its original intervening petition in said cause was filed by leave of court in said cause on the 17th day of April,
558 1895, and by leave of this Honorable Court first had and obtained, for its second supplemental petition in said cause, the Wabash Railroad Company further shows to the court:

That it is a consolidated railway corporation duly organized as such on or about August 1st in the year 1889, under and by virtue of the laws of the State of Missouri, and that it has succeeded under various purchases at sundry judicial and private sales as well as by virtue of various acts of consolidation had in accordance with the laws of said State, to all the rights, property, franchises, powers and choses in action formerly owned, held and possessed by its predecessor in title, the Wabash, St. Louis & Pacific Railway Company, and that it has since said year 1889 continuously owned and operated a line of railway, right-of-way, tracks, side-tracks, turn-outs, turn-tables, and other terminal facilities appurtenant thereto, between the north line of Forest Park in the City of St. Louis and 18th street in said city, formerly owned and operated by said Wabash, St. Louis & Pacific Railway Company, which said line of railway connects and intersects at said Forsythe Junction in the County of St. Louis with the line of railway owned and operated by the St. Louis, Kansas City & Colorado Railroad Company, which last named road is now in charge of Adiel Sherwood as receiver, thereof, as hereinafter stated.

That the St. Louis, Kansas City & Colorado Railroad Company is a corporation duly organized and existing under and by virtue of the laws of the State of Kansas, and has owned and operated since the year 1886, as well as prior thereto, a line

of railway connecting and intersecting with the railroad of this intervenor at a point known as Forsythe Junction in the County of St. Louis.

That on the 31st day of December, 1886, in the consolidated cause in equity in this Honorable Court numbered
559 2357 and 2464, entitled the Central Trust Company of New York et al., complainants, vs. The Wabash, St. Louis & Pacific Railway Company et al., defendants, the City of St. Louis and the St. Louis Kansas City & Colorado Railroad Company, intervenors, a decree was entered by this Honorable Court providing among other things that the St. Louis, Kansas City & Colorado Railroad Company might use the right of way, tracks, side tracks, switches, turnouts, turntables, and other terminal facilities of the said Wabash, St. Louis & Pacific Railway Company at and between the north line of Forest Park and Eighteenth street in the City of St. Louis, Missouri, and that for use the said St. Louis, Kansas City & Colorado Railroad Company should pay to said Wabash, St. Louis & Pacific Railway Company and its successors in interest the sum of Thirty Thousand Dollars per annum, in monthly installments of Twenty-five Hundred Dollars each, on the 15th day of each month, so long as said decree remained in force; and also that the expenses per annum of maintaining the said right of way and other property pending such joint use thereof, including the taxes upon said property, should be borne by the Wabash, St. Louis & Pacific Railway Company and the St. Louis, Kansas City & Colorado Railroad Company in proportion to the number of wheels each of said companies should cause to be passed over the main track or parts thereof on said right of way per annum bore to the total number of wheels that both of said companies cause to be passed over the main track or parts thereof on the right of way of said intervenor during each year pending the said period of such joint use, and that this expense should be paid at the expiration of each year.

That said decree still remains in force and has never been modified by this Honorable Court.

560 That on the 14th day of September, 1894, Adiel Sherwood was duly appointed by this Honorable Court as receiver of the St. Louis, Kansas City & Colorado Railroad Company and that said Adiel Sherwood has been since said date and now is operating said road as such receiver.

That since December 31, 1886, the date of said decree, and until the 30th day of November, 1897, and continuously since said time, the St. Louis, Kansas City & Colorado Railroad Company and Adiel Sherwood, receiver as aforesaid, have been

continuously and jointly using with intervenor the right of way, tracks, side tracks, switches, turnouts, turn-tables, shops and other terminal facilities as aforesaid, formerly owned by the Wabash, St. Louis & Pacific Railway Company but now the property of intervenor, at and between said north line of Forest Park and Eighteenth street in the City of St. Louis, as before described and as provided in said decree.

That in the order appointing said receiver, as before stated, he was directed out of the moneys that had or should come into his hands, to pay all sums due or to become due, connecting or intersecting lines of railway for track service of other railroads, that had been used by the St. Louis, Kansas City & Colorado Railroad Company, in the operation of its lines, and also all just and legal debts, demands or liabilities due or owing to the St. Louis, Kansas City & Colorado Railroad Company, which were contracted, accrued or were incurred for work, labor, materials, machinery, fixtures and supplies of every kind and character done, performed, or furnished in the construction, repair, equipment or operation of said St. Louis, Kansas City & Colorado Railroad.

That said Adiel Sherwood, receiver of the St. Louis, Kansas City & Colorado Railroad Company, as aforesaid, is justly indebted to this intervenor on account of track service
561 of intervenor, used by said receiver in the operation of the line of railway in his charge between the north line of Forest Park and Eighteenth street, in the City of St. Louis, as aforesaid, under said decree, dated December 31st, 1886, as aforesaid, for the months of August to December, 1894, January to December, both inclusive, for the year 1895, and January to December, both inclusive, for year 1896, and January to December, both inclusive, for year 1897, and January to March, 1898, the sum of one hundred and ten thousand dollars ($110,000.00), as will more fully appear from the itemized statement thereof hereto attached and marked Exhibit "A."

That said sums, as hereinbefore stated, have often been demanded of said receiver by intervenor but that said receiver has failed and refused and still fails and refuses to pay said sums so due and payable in pursuance of said decree of December 31st, 1886, and directed to be paid by said order of court as aforesaid, to intervenor, although often demanded as aforesaid.

Wherefore intervenor prays this Honorable Court for an order directing Adiel Sherwood, receiver, to pay forthwith to intervenor said sum of One Hundred and Ten Thousand dollars, with interest from date, monthly, on said sum as said interest accrued at the rate of six per cent. per annum, out of any funds now in his possession or that shall hereafter come into his

hands as such receiver, and that in default thereof said sums may be decreed and declared to be a first lien upon the property of the St. Louis, Kansas City & Colorado Railroad Company now in the hands of said Adiel Sherwood, receiver as aforesaid, superior in right to any mortgages now existing or covering said property and for such other and further relief, orders and decrees touching the matter in controversy as unto
562 equity may appertain, and as this Honorable Court may deem just and proper in the premises.

II.

Now comes the Wabash Railroad Company, intervenor, in the above entitled cause, and respectfully states to the court, that its original intervening petition in said cause was filed by leave of this court in said cause on the 17th day of April, 1895, and by leave of this Honorable Court first had and obtained, for its second supplemental petition in said cause, the Wabash Railroad Company further shows to the court:

That it is a consolidated railway corporation duly organized as such on or about August 1st in the year 1889, under and by virtue of the laws of the State of Missouri, and that it has succeeded under various purchases at sundry judicial and private sales as well as by virtue of various acts of consolidation had in accordance with the laws of said State, to all the rights, property, franchises, powers and choses in action formerly owned, held and possessed by its predecessor in title, the Wabash, St. Louis & Pacific Railway Company, and that it has since said year 1889, continuously owned and operated a line of railway, right of way, tracks, side tracks, turnouts, turntables, and other terminal facilities appurtenant thereto, between the north line of Forest Park in the City of St. Louis and Eighteenth street in said city, formerly owned and operated by said Wabash, St. Louis & Pacific Railway Company, which said line of railway connects and intersects Forsythe Junction in the County of St. Louis with the line of railway owned and operated by the St. Louis, Kansas City & Colorado Railroad Company, which last named road is now in charge of Adiel Sherwood as receiver thereof as hereinafter stated.

563 That the St. Louis, Kansas City & Colorado Railroad Company is a corporation duly organized and existing under and by virtue of the laws of the State of Kansas and has owned and operated since the year 1886, as well as prior thereto, a line of railway connecting and intersecting with the railroad of this intervenor at a point known as Forsythe Junction in the County of St. Louis.

That on the 31st day of December, 1886, in the consolidated cause in equity in this Honorable Court, numbered 2357 and

2464, entitled the Central Trust Company of New York et al., complainants, vs. The Wabash, St. Louis & Pacific Railway Company et al., defendants, the City of St. Louis and the St. Louis, Kansas City & Colorado Railroad Company, intervenors, a decree was entered by this Honorable Court, providing, among other things, that the St. Louis, Kansas City & Colorado Railroad Company might use the right of way, tracks, side tracks, switches, turnouts, turntables, and other terminal facilities of the said Wabash, St. Louis & Pacific Railway Company at and between the north line of Forest Park and Eighteenth street in the city of St. Louis, Missouri, and that for such use the said St. Louis, Kansas City & Colorado Railroad Company should pay the said Wabash, St. Louis & Pacific Railway Company and its successors in interest the sum of Thirty Thousand Dollars per annum, in monthly installments of Twenty-five Hundred Dollars each on the 15th day of each month so long as said decree remained in force; and also that the expense per annum of maintaining the said right of way and other property pending such joint use thereof, including all taxes upon said property, should be borne by the Wabash, St. Louis & Pacific Railway Company, and the St. Louis, Kansas City & Colorado Railroad Company in proportion to the number of wheels
564 each of said companies should cause to be passed over the main track or parts thereof on said right of way per annum should bear to the total number of wheels that both of said companies should cause to be passed over the same during each year pending the said period of such joint use, and that said expense should be paid at the expiration of each year.

That said decree still remains in force and has never been modified by this Honorable Court.

That on the 14th day of September, 1894, Adiel Sherwood was duly appointed by this Honorable Court as receiver of the St. Louis, Kansas City & Colorado Railroad Company and that said Adiel Sherwood has been since said date and now is, operating said road as such receiver.

That since December 31, 1886, the date of said decree, until the 14th day of September, 1894, and until the 31st day of October, 1897, and continuously since said time, the St. Louis, Kansas City & Colorado Railroad Company and Adiel Sherwood, its receiver as aforesaid, have been continuously and jointly using with intervenor the right of way, tracks, side tracks, switches, turnouts, turntables, shops and other terminal facilities as aforesaid, formerly owned by the said Wabash, St. Louis & Pacific Railway Company, but now the property of intervenor, at and between said Forsythe Junction and Eighteenth street in the City of St. Louis, Mo., as before described and as provided in said decree hereinbefore recited.

That in the order appointing said receiver as before stated, he was directed out of the moneys that had or should come into his hands, to pay all sums due, or to become due, connecting or intersecting lines of railway for track service of other railroads used by the St. Louis, Kansas City & Colorado Railroad Company, which were contracted, accrued, or were incurred for work, labor, materials, machinery, fixtures,
565 and supplies of every kind and character, done, performed or furnished in the construction, repair, equipment or operation of said St. Louis, Kansas City & Colorado Railroad.

That said Adiel Sherwood, receiver of the St. Louis, Kansas City & Colorado Railroad Company, as aforesaid, is justly indebted to this intervenor for the expense of maintaining said right of way, tracks, etc., of intervenor between Forsythe Junction and Eighteenth street in the City of St. Louis, used by said receiver under said decree of December 31st, 1886, including taxes upon said property in proportion to the number of wheels each of said railroads, to-wit, the railroad of intervenor and of said receiver have caused to be passed over the main track or parts thereof on said right of way from April 30, 1894, to October 31, 1897, bore to the total number of wheels intervenor and said receiver have caused to be passed over the same during said period of such joint use, and that said sums became due originally in the years 1894, 1895, 1896 and 1897, as aforesaid, under said decree of December 31st, 1886, as hereinbefore set forth.

That said sums so due, as aforesaid, amount to $10,741.33 as will more fully appear from an itemized statement thereof hereto attached and marked "Exhibit B."

That said sum of $10,741.33, as aforesaid, became due as aforesaid, and that on said day and since said time said receiver, Adiel Sherwood, has failed and refused to pay said sums, or any part thereof, although the same have often been demanded of said receiver by intervenor.

Wherefore this intervenor prays this Honorable Court for an order directing said Adiel Sherwood, receiver, to pay forthwith to intervenor said sum of $10,741.33, with interest monthly from the date said respective sums became due, at the
566 rate of six per cent. per annum, as hereinbefore set forth out of any funds now in his possession or that shall hereafter come into his hands as such receiver, and that in default thereof said sums may be decreed and declared to be a first lien upon the property of the St. Louis, Kansas City & Colorado Railroad Company now in the hands of said Adiel Sherwood, receiver, as aforesaid, superior in right to any mortgages now

existing or covering said property and for such other and further relief, orders and decrees touching the matter in controversy as unto equity may appertain and as this Honorable Court may deem just and proper in the premises.

III.

Now comes the Wabash Railroad Company, intervenor, in the above entitled cause, and respectfully states to the court, that its original intervening petition in said cause was filed by leave of this court in said cause on the 17th day of April, 1895, and by leave of this Honorable Court first had and obtained, for its second supplemental petition in said cause, the Wabash Railroad Company further shows to the court:

That it is a consolidated railway corporation duly organized as such on or about August 1st in the year 1889, under and by virtue of the laws of the State of Missouri, and that it has succeeded under various purchases at sundry judicial and private sales as well as by virtue of various acts of consolidation had in accordance with the laws of said State, to all the rights, property, franchises, powers and choses in action formerly owned, held and possessed by its predecessor in title, the Wabash, St. Louis & Pacific Railway Company, and that it has since said year 1889, continuously owned and operated a line
of railway, right of way, tracks, side tracks, turnouts,
567 turntables and other terminal facilities appurtenant
thereto, between the north line of Forest Park in the City of St. Louis and Eighteenth street in said city, formerly owned and operated by said Wabash, St. Louis & Pacific Railway Company, which said line of railway connects and intersects at Forsythe Junction in the County of St. Louis with the line of railway owned and operated by the St. Louis, Kansas City & Colorado Railroad Company, which last named road is now in charge of Adiel Sherwood as receiver thereof as hereinafter stated.

That the St. Louis, Kansas City & Colorado Railroad Company is a corporation duly organized and existing under and by virtue of the laws of Kansas, and has owned and operated since the year 1886, as well as prior thereto, a line of railway connecting and intersecting with the railroad of this intervenor at a point known as Forsythe Junction in the County of St. Louis.

That on the 31st day of December, 1886, in the consolidated cause in equity in this Honorable Court numbered 2357 and 2461, entitled the Central Trust Company of New York et al., complainants, vs. the Wabash, St. Louis & Pacific Railway Company et al., defendants, the City of St. Louis and the St.

Louis, Kansas City & Colorado Railroad Company, intervenors a decree was entered by this Honorable Court, providing among other things that the St. Louis, Kansas City & Colorado Railroad Company might use the right of way, tracks, side tracks, switches, turnouts, turntables and other terminal facilities of the said Wabash, St. Louis & Pacific Railway Company at and between the north line of Forest Park and Eighteenth street in the City of St. Louis, Missouri, and that for such use the said St. Louis, Kansas City & Colorado Railroad Company should pay to said Wabash, St. Louis & Pacific Railway Company
568 and its successors in interest the sum of Thirty Thousand Dollars per annum, in monthly installments of Twenty-five Hundred Dollars each on the 15th day of each month, so long as said decree remained in force; and also that the expense per annum of maintaining the said right of way and other property pending such joint use thereof, including all taxes upon said property, should be borne by the Wabash, St. Louis & Pacific Railway Company and the St. Louis, Kansas City & Colorado Company in proportion to the number of wheels each of said companies should cause to be passed over the main track or parts thereof on said right of way per annum should bear to the total number of wheels that both of said companies should cause to be passed over the same during each year pending the said period of such joint use, and that said expense should be paid at the expiration of each year.

That said decree still remains in force and has never been modified by this Honorable Court.

That on the 14th day of September, 1894, Adiel Sherwood was duly appointed by this Honorable Court as receiver of the St. Louis, Kansas City & Colorado Railroad Company and that said Adiel Sherwood has been since said date and now is operating said road as such receiver.

That since December 31, 1886, the date of said decree, until the 14th day of September, 1894, and until the 31st day of October, 1897, and continuously since said time, the St. Louis, Kansas City & Colorado Railroad Company and Adiel Sherwood, its receiver as aforesaid, have been continuously and jointly using with intervenor the right of way, tracks, side tracks, switches, turnouts, turntables, shops, and other terminal facilities as aforesaid, formerly owned by the said Wabash, St. Louis & Pacific Railway Company, but now the property of intervenor at and between said Forsythe Junction and Eigh-
569 teenth street in the City of St. Louis, Mo., as before described and as provided in said decree hereinbefore recited.

That in the order appointing said receiver, as before stated, he was directed, out of the moneys that had or should come into his hands, to pay all sums due, or to become due, connecting or intersecting lines of railway for track service of other railroads used by the St. Louis, Kansas City & Colorado Railroad Company, which were contracted, accrued, or were incurred for work, labor, materials, machinery, fixtures and supplies of every kind and character, done, performed, or furnished in the construction, repair, equipment or operation of said St. Louis, Kansas City & Colorado Railroad.

That said intervenor since December 31, 1886, and down to the present time, then owned and still owns and operates what is known as a switching yard at Ewing avenue in the City of St. Louis, Missouri, connecting with its main track between Union avenue and Eighteenth street in the City of St. Louis, as aforesaid, in which said yard a large number of engines and cars were and are constantly moved for the intervenor and for the defendants herein, and other parties. That at the special instance and request of the St. Louis, Kansas City & Colorado Railroad Company, defendant herein, and of Adiel Sherwood, receiver of the St. Louis, Kansas City & Colorado Railroad Company, defendant herein, intervenor has, from May, 1894, up to and including the month of October, 1897, and down to date has handled the cars of said St. Louis, Kansas City & Colorado Railroad Company, and of said Adiel Sherwood, receiver of said St. Louis, Kansas City & Colorado Railroad Company, in said yard, under an agreement with said defendants that the defendant's proportion of the expenses
570 of maintaining and operating said switching yard at said Ewing avenue in said city should be divided upon a wheelage basis, in the proportion that the cars moved for said defendants bear to the total number of cars moved in said yard.

That said expenses were and are not covered by said decree of December 31, 1886, and were and are not contemplated by said decree, and were and are entirely outside of the terms of said decree. That said expenses have been computed, as aforesaid, in accordance with a general, well-established and universal custom among railroad companies, relating to the operation of said yard, and the division of expenses thereof; and that said method of computing said expenses, as aforesaid, has long been acquiesced in by these defendants, and was so computed at their instance and request.

That said Adiel Sherwood, receiver of the St. Louis, Kansas City & Colorado Railroad Company, as aforesaid, is justly indebted to this intervenor for the expense of operating said switching yard at Ewing avenue in the City of St. Louis, as

aforesaid, in the sum of $34,168.67, as will more fully appear from an itemized statement thereof hereto attached and marked "Exhibit C," together with interest monthly from the time the sum aforesaid became due, at the rate of six per cent per annum.

IV.

Now comes the Wabash Railroad Company, intervenor, in the above entitled cause, and respectfully states to the court, that the junction point, or intersection of the line of railway of the St. Louis, Kansas City & Colorado Railroad Company, which said railway is now in the hand of Adiel Sherwood, receiver, with the line of railway owned and operated by
571 the intervenor, between Eighteenth street in the City of St. Louis, Missouri, and said junction point, was on the 31st day of December, 1886, ever has been and is now, a few hundred feet more or less east of what is known as Forsythe Junction, a station on the line of the two railways hereinbefore mentioned. That at said Forsythe Junction, the intervenor erected about the year 1894, a commodious passenger station at great expense. That at the special instance and request of the St. Louis, Kansas City & Colorado Railroad Company, and of its receiver, the intervenor so constructed said station at Forsythe Junction as to permit the joint use of said station by said St. Louis, Kansas City & Colorado Railway Company and its receiver, together with this intervenor. That said station is located directly between the two tracks owned and operated respectively by the St. Louis, Kansas City & Colorado Railroad Company and the intervenor at said point, and that the platforms surrounding said station abut upon and connect with the two lines of railway at said point.

That on or about the first day of December, 1887, the St. Louis, Kansas City & Colorado Railway Company, defendant herein, and this intervenor, entered into a certain contract in writing, a true copy of which is hereto attached to this amendment, made a part hereof and marked "Exhibit A," wherein and whereby said intervenor undertook and agreed to maintain and operate said station at Forsythe Junction, as aforesaid, and said company undertook and agreed to pay said intervenor monthly one-half the expense of labor, supplies and material expended by intervenor in the maintenance and operation of said joint station at Forsythe Junction, as aforesaid.

That the expense justly chargeable to said St. Louis, Kansas City & Colorado Railroad Company and said receiver
572 for the maintenance and operation of said station at Forsythe Junction from May, 1894, to November, 1897, amounts to the sum of $456.74, (with interest at the rate of

six per cent. per annum from the time the sum aforesaid became due) as the same is more fully shown by "Exhibit D," hereto attached and made a part of this petition.

Exhibit A.

"This Agreement, made this 1st day of December, A. D. 1887, by and between the Wabash Western Railway Company, party of the first part, and the St. Louis, Kansas City & Colorado Railroad Company, party of the second part, Witnesseth:

That whereas, the party of the second part has constructed their own track from Forsythe Junction to a connection with the main track of the party of the first part, at the north line of Forest Park, and has put the same in good condition for use, and whereas, it is deemed advantageous and best for the interests and convenience of both parties to use the tracks owned by said parties between Forsythe Junction and the north line of Forest Park in common, and as joint tracks, and operate the two tracks as a double track railroad between the points designated,—

Now, therefore, it is agreed and understood by and between the parties to this contract that the tracks owned by the parties to this contract, between the points above designated shall be used in common and operated as a double track railroad, the party of the second part to have charge of the maintenance and renewal of its own track and to pay the cost of same, and the party of the first part to have charge of the maintenance and renewal of its own track, and the cost of the said maintenance and renewal of the said track of the Wabash Western
573 Railway Company to be paid by each party in proportion to the number of cars running over said track.

The party of the first part is to have entire control of the movements of all trains and engines on the above mentioned tracks. First-class trains of either party to have preference over second-class trains of either party, and in case of damage or loss to property or persons in transit, each party to bear its own expense for such loss, unless the loss may be directly caused by the negligence of the other party, and, in the last named case, the matter shall be submitted to arbitration in the usual manner.

The party of the second part shall acquire one-half interest and ownership in the depot at Forsythe Junction, on payment to the party of the first part of one-half the cost of same, and the said party of the second part shall also pay to the party of the first part, one-half the salary of the agents and operators, and such necessary flagmen and switchmen as

may be necessary, and, also, one-half the cost of supplies required for such agents, operators, flagmen and switchmen. All bills to be paid on or before the 20th of each month for the expenses incurred in the previous month.

The party of the first part to have the right to remove their present spur track on which derrick is located, northwardly as shown approximately on the sketch herewith, on the right of way of the party of the second part, so as not to destroy its usefulness or interfere with the operation of the two tracks as agreed upon.

Each party to pay the taxes on their own property.

The payments provided for in this contract to be substituted for and instead of the rental of one hundred and fifty dollars per month, as agreed upon March 5th, 1887, now being paid by the party of the second part.

574 This contract shall not be construed as in any way affecting or bearing upon the present running arrangement or arrangements for use of the track between Forest Park and Union Depot.

This contract can be terminated by either party by giving sixty days' notice in writing to the other party of its intention to do so.

In Witness Whereof, the parties have caused this contract to be executed in duplicate the day and year above written.

THE WABASH WESTERN RAILWAY COMPANY,
(Signed By Chas. M. Hays, Gen'l Manager.

ST. LOUIS, KANSAS CITY & COLORADO RY. CO.,
(Signed) By S. T. Emerson, Chief Eng'r and Supt."

That said Adiel Sherwood, receiver of the St. Louis, Kansas City & Colorado Railroad Company, as aforesaid, is justly indebted to this intervenor for his proportion of the expense of maintaining Forsythe Junction, under said contract hereinbefore referred to and for supplies furnished to said station under said agreement in the sum of $456.74, as will more fully appear from an itemized statement thereof hereto attached and marked "Exhibit D."

That said sum of $456.74, as aforesaid, became due monthly as shown on said Exhibit D, and that on said day and since said time said receiver, Adiel Sherwood, has failed and refused to pay said sum, or any part thereof, although the same has often been demanded of said receiver by intervenor.

575 Wherefore this intervenor prays this Honorable Court for an order directing said Adiel Sherwood, receiver, to pay forthwith to intervenor said sum of $456.74, with interest thereon monthly as the same fell due at the rate of six per cent. per annum, as hereinbefore set forth, out of any funds now in his possession, or that shall hereafter come into his hands as such receiver, and that in default thereof, said sums may be decreed and declared to be a first lien upon the property of the St. Louis, Kansas City & Colorado Railroad Company, now in the hands of said Adiel Sherwood, receiver as aforesaid, superior in right to any mortgages now existing or covering said property, and for such other and further relief, orders and decrees touching the matter in controversy as unto equity may appertain and as this Honorable Court may deem just and proper in the premises.

V.

Now comes the Wabash Railroad Company, intervenor, in the above entitled cause, and respectfully states to the court, that its original intervening petition in said cause was filed by leave of this court in said cause on the 17th day of April, 1895, and by leave of this Honorable Court first had and obtained, for its second supplemental petition in said cause, the Wabash Railroad Company further shows to the Court:

That it is a consolidated railway corporation duly organized as such on or about the 1st day of August, in the year 1889, under and by virtue of the laws of the State of Missouri, and that it has succeeded under various purchases at sundry judicial and private sales, as well as by virtue of various acts of consolidation had in accordance with the laws of said State, to all the rights, property, franchises, powers and choses

576 in action formerly owned, held and possessed by its predecessor in title, the Wabash, St. Louis & Pacific Railway Company, and that it has since said year 1889, continuously owned and operated a line of railway, right of way, tracks, side tracks, turnouts, turntables and other terminal facilities appurtenant thereto, between the north line of Forest Park in the City of St. Louis and Eighteenth street in said city, formerly owned and operated by said Wabash, St. Louis & Pacific Railway Company, which said line of railway connects and intersects at said Forsythe Junction with the line of railway owned and operated by the St. Louis, Kansas City & Colorado Railroad Company, which last named road is now in charge of Adiel Sherwood, as receiver thereof, as hereinafter stated.

That the St. Louis, Kansas City & Colorado Railroad Company is a corporation duly organized and existing under and

by virtue of the laws of the State of Kansas and has owned and operated since the year 1886, as well as prior thereto, a line of railway connecting and intersecting with the railroad of this intervenor at a point known as Forsythe Junction in the County of St. Louis.

That on the 31st day of December, 1886, in the consolidated cause in equity in this Honorable Court, numbered 2357 and 2464, entitled The Central Trust Company of New York et al., complainant, vs. the Wabash, St. Louis & Pacific Railway Company et al., defendants, the City of St. Louis and the St. Louis, Kansas City & Colorado Railroad Company, intervenors, a decree was entered by this Honorable Court, providing among other things that the St. Louis, Kansas City & Colorado Railroad Company might use the right of way, tracks, side tracks, switches, turntables, turnouts and other terminal facilities of the said Wabash, St. Louis & Pacific Railway Company
577 at and between the north line of Forest Park and Eighteenth street in the City of St. Louis, Missouri, and that for such use the said St. Louis, Kansas City & Colorado Railroad Company should pay to said Wabash, St. Louis & Pacific Railway Company and its successors in interest, the sum of Thirty Thousand Dollars per annum, in monthly installments of Twenty-five Hundred Dollars each, on the 15th day of each month, so long as said decree remained in force; and also that the expense per annum of maintaining the said right of way and other property pending such joint use thereof, including all taxes upon said property, should be borne by the Wabash, St. Louis & Pacific Railway Company, and the St. Louis, Kansas City & Colorado Railroad Company in proportion to the number of wheels each of said companies should cause to be passed over the main track or parts thereof on said right of way per annum should bear to the total number of wheels that both of said companies should cause to be passed over the same during each year pending the period of such joint use, and that said expense should be paid at the expiration of each year.

That said decree still remains in force and has never been modified by this Honorable Court.

That on the 14th day of September, 1894, Adiel Sherwood was duly appointed by this Honorable Court as receiver of the St. Louis, Kansas City & Colorado Railroad Company and that said Adiel Sherwood has been since said date and now is operating said road as such receiver.

That since December 31, 1886, the date of said decree, until the 14th day of September, 1894, and until the 1st day of October, 1897, and continuously since said time, the St. Louis,

Kansas City & Colorado Railroad Company and its said receiver, Adiel Sherwood, have been continuously and jointly using with intervenor, the right of way, tracks, side-
578 tracks, switches, turnouts, turntables, shops and other terminal facilities as aforesaid, formerly owned by said Wabash, St. Louis & Pacific Railway Company but now the property of intervenor, at and between said north line of Forest Park and Eighteenth street in the City of St. Louis, Missouri, as before described, and as provided in said decree.

That in the order appointing said receiver as before stated, he was directed out of the moneys that had or should come into his hands to pay all sums due or to become due connecting or intersecting lines of railway for track service of other railroads used by the St. Louis, Kansas City & Colorado Railroad Company in the operation of its lines, and also all just and legal debts, demands, or liabilities due or owing by the St. Louis, Kansas City & Colorado Railroad Company, which were contracted, accrued, or were incurred for work, labor, materials, machinery, fixtures and supplies of every kind and character done, performed, or furnished in the construction, repair, equipment or operation of said St. Louis, Kansas City & Colorado Railroad.

That since the appointment of said Adiel Sherwood as receiver, to-wit: from the 13th day of September, 1894, and from January 31, 1895, to the first day of October, 1897, inclusive, intervenor has performed labor for said Adiel Sherwood, receiver, in printing, repairing his telegaph lines, and repairing the cars of said receiver, and has furnished supplies to said receiver during said period amounting to the sum of $714.40, and that said work done, materials and supplies furnished to said receiver for and to said receiver by intervenor, have been appropriated by said receiver to the betterment of the property of the St. Louis, Kansas City & Colorado Railroad Company then as now in his charge, and that said sums were justly
579 chargeable to said receiver as a part of the operating expenses of said St. Louis, Kansas City & Colorado Railroad Company during said period.

That said work done, materials and supplies furnished to said receiver during said period as aforesaid, amounts to the sum of $714.40, as will more fully appear from an itemized statement thereof hereto attached and marked "Exhibit E."

That said sum of $714.40 has been due and payable monthly to intervenor from said receiver since January 31, 1895, to October 31, 1897, and though often demanded by intervenor, said receiver has failed and refused to pay said sum or any part thereof and the sum is still due and payable to intervenor.

Wherefore, this intervenor prays this Honorable Court for an order directing said Adiel Sherwood, receiver, to pay forthwith to intervenor said sum of $714.40, as hereinbefore set forth, together with interest thereon at six per cent per annum, from the time said sum became due and payable, out of any funds now in his possession or that shall hereafter come into his hands as such receiver, and that in default thereof said sum may be decreed and declared to be a first lien upon the property of the St. Louis, Kansas City & Colorado Railroad Company now in the hands of said Adiel Sherwood, receiver as before said, superior in right to any mortgages now existing or covering said property and for such other and further relief, orders and decees touching the matter in controversy as unto equity may appertain, and as this Honorable Court may deem just and proper in the premises.

VI.

Now comes the Wabash Railroad Company, intervenor in the above entitled, cause, and respectfully states to the
580 court, that its original intervening petition in said cause was filed by leave of this court in said cause on the 17th day of April, 1895, and by leave of this Honorable Court first had and obtained, for its second supplemental petition in said cause, the Wabash Railroad Company further shows to the court:

That it is a consolidated railway corporation duly organized as such on or about August 1st, in the year 1889, under and by virtue of the laws of the State of Missouri, and that it has succeeded under various purchases at sundry judicial and private sales, as well as by virtue of various acts of consolidation had in accordance with the laws of said State, to all the rights, property, franchises, powers and choses in action formerly owned, held and possessed by its predecessor in title, the Wabash, St. Louis & Pacific Railway, and that it has since said year 1889, continuously owned and operated a line of railway, right of way, tracks, side tracks, turnouts, turntables, and other terminal facilities appurtenant thereto, between the north line of Forest Park in the City of St. Louis and Eighteenth street in said city, formerly owned and operated by said Wabash, St. Louis & Pacific Railway Company, which said line of railway connects and intersects at Forsythe Junction in the County of St. Louis with the line of railway owned and operated by the St. Louis,Kansas City & Colorado Railroad Company, which last named road is now in charge of Adiel Sherwood, as receiver thereof, as hereinafter stated.

That the St. Louis, Kansas City & Colorado Railroad Company is a corporation duly organized and existing under and by

virtue of the laws of the State of Kansas, and has owned and operated since the year 1886, as well as prior thereto, a line of railway connecting and intersecting with the railroad of
581 this intervenor at a point known as Forsythe Junction in the County of St. Louis.

That on the 31st day of December, 1886, in the consolidated cause in equity in this Honorable Court, numbered 2357 and 2464, entitled the Central Trust Company of New York et al., complainants, vs. the Wabash, St. Louis & Pacific Railway Company et al., defendants, the City of St. Louis and the St. Louis, Kansas City & Colorado Railroad Company, intervenors, a decree was entered by this Honorable Court, providing among other things, that the St. Louis, Kansas City & Colorado Railroad Company might use the right of way, tracks, side tracks, switches, turnouts, turntables and other terminal facilities of the said Wabash, St. Louis & Pacific Railway Company at and between the north line of Forest Park and Eighteenth street in the City of St. Louis, Missouri, and that for such use the said St. Louis, Kansas City & Colorado Railroad Company should pay to said Wabash, St. Louis & Pacific Railway Company and its successors in interest the sum of Thirty Thousand Dollars per annum, in monthly installments of Twenty-five Hundred Dollars each, on the 15th day of each month, so long as said decree remained in force; and also that the expense per annum of maintaining the said right of way and other property pending such joint use thereof, including all taxes upon said property, should be borne by the Wabash, St. Louis & Pacific Railway Company and the St. Louis, Kansas City & Colorado Company in proportion to the number of wheels each of said companies should cause to be passed over the main track or parts thereof on said right of way per annum should bear to the total number of wheels that both of said companies should cause to be passed over the same during each year pending the said period
582 of such joint use, and that said expense should be paid at the expiration of each year.

That said decree still remains in force and has never been modified by this Honorable Court.

That on the 14th day of September, 1894, Adiel Sherwood was duly appointed by this Honorable Court as receiver of the St. Louis, Kansas City & Colorado Railroad Company and that said Adiel Sherwood has been since said date and now is, operating said road as such receiver.

That since December 31, 1886, the date of said decree, until the 14th day of September, 1894, and until the 31st day of Oc-

tober, 1897, and continuously since said time, the St. Louis, Kansas City & Colorado Railroad Company and Adiel Sherwood, its receiver as aforesaid, have been continuously and jointly using with intervenor the right of way, tracks, side tracks, switches, turnouts, turntables, shops and other terminal facilities as aforesaid, formerly owned by the said Wabash, St. Louis & Pacific Railway Company, but now the property of intervenor, at and between said Forsythe Junction and Eighteenth street in the City of St. Louis, Mo., as before described and as provided in said decree hereinbefore recited.

That in the order appointing said receiver as before stated, he was directed out of the moneys that had or should come into his hands, to pay all sums due, or to become due, connecting or intersecting lines of railway for track service of other railroads used by the St. Louis, Kansas City & Colorado Railroad Company, which were contracted, accrued, or were incurred, for work, labor, materials, machinery, fixtures and supplies of every kind and character done, performed or furnished in the construction, repair, equipment or operation of said St. Louis, Kansas City & Colorado Railroad.

583 That said Adiel Sherwood, receiver of the St. Louis, Kansas City & Colorado Railroad Company, as aforesaid, is justly indebted to this intervenor for the expense of maintaining said right of way, tracks, etc., of intervenor, between Forsythe Junction and Eighteenth street in the City of St. Louis, used by said receiver under said decree of December 31, 1886, including taxes upon said property in proportion to the number of wheels each of said railroads, to-wit, the railroad of intervenor and of said receiver have caused to be passed over the main track or parts thereof on said right of way from October 31, 1897, to February 28, 1898, bore to the total number of wheels intervenor and said receiver have caused to be passed over the same during said period of such joint use, and that said sums became due February 28, 1898, as aforesaid, under said decree of December 31, 1886, as hereinbefore set forth.

That said sums so due, as aforesaid, amount to $2,129.59, as will more fully appear from an itemized statement thereof hereto attached and marked "Exhibit B."

That said sum of $2,129.59 as aforesaid became due as aforesaid on the 28th day of February, 1898, and that on said day and since said time said receiver, Adiel Sherwood, has failed and refused to pay said sums, or any part thereof, although the same have often been demanded of said receiver by intervenor.

Wherefore, this intervenor prays this Honorable Court for an order directing said Adiel Sherwood, receiver to pay forthwith to intervenor said sum of $2,129.59, with interest thereon at the rate of six per cent, per annum, as hereinbefore set forth out of any funds now in his possession or that shall hereafter come into his hands as such receiver, and that in default thereof said sums may be decreed and declared to be a first lien upon the property of the St. Louis, Kansas City & Colorado
584 Railroad Company now in the hands of said Adiel Sherwood, receiver as aforesaid, superior in right to any mortgages now existing or covering said property and for such other and further relief, orders and decrees touching the matter in controversy as unto equity may appertain and as this Honorable Court may deem just and proper in the premises.

THE WABASH RAILROAD COMPANY,
By Geo. S. Grover, its Solicitor.

EXHIBIT "A."

THE WABASH RAILROAD COMPANY.

Auditor's Office, St. Louis, Mo.,.....

Statement of Bills which have been rendered against St. Louis, Kansas City and Colorado R. R. and Adiel Sherwood, Receiver, and which remain unsettled this date.
For Rental for Use of Tracks, etc., as provided for by the Decree of December 31st, 1886:

72174	For the Month of August,	1894..	$ 2,500.00	These items were included in Exhibit "A" of Original Petition.
73393	September,	1894..	2 500.00	
74862	October,	1894..	2,500.00	These items were included in Exhibit "D" of Original Petition.
76437	November,	1894..	2,500.00	
78095	December,	1894..	2,500.00	
79641	January,	1895..	2,500.00	
81189	February,	1895..	2,500.00	
82642	March,	1895..	2,500.00	
84267	April,	1895..	2,500.00	
86008	May,	1895..	2,500.00	
87500	June,	1895..	2,500.00	
88814	July,	1895..	2,500.00	
90349	August,	1895..	2,500.00	
91868	September,	1895..	2,500.00	
93361	October,	1895..	2,500.00	
94816	November,	1895..	2,500.00	
96242	December,	1895..	2,500.00	
97697	January,	1896..	2,500.00	
99424	February,	1896..	2,500.00	
933	March,	1896..	2,500.00	
2704	April,	1896..	2,500.00	
4182	May,	1896..	2,500.00	
5728	June,	1896..	2,500.00	
7218	July,	1896..	2,500.00	These items were included in Exhibit "A" of Supplemental Petition.
8425	August,	1896..	2,500.00	
10206	September,	1896..	2,500.00	
11524	October,	1896..	2,500.00	
12917	November,	1896..	2 500.00	
14319	December,	1896..	2,500.00	
15763	January,	1897..	2,500.00	
17173	February,	1897..	2,500.00	
18549	March,	1897..	2,500.00	
19986	April,	1897..	2,500.00	
21611	May,	1897..	2,500.00	
23257	June,	1897..	2,500.00	
24963	July,	1897..	2,500.00	
26754	August,	1897..	2,500.00	
28264	September,	1897..	2,500.00	
29980	October,	1897..	2,500.00	
31709	November,	1897..	2,500.00	
32809	December,	1897..	2,500.00	
34931	January,	1898..	2,500.00	
36985	February,	1898..	2,500.00	
38463	March,	1898..	2,500.00	
			$110,000.00	

(Filed May 1, 1905, James R. Gray, Clerk.)

EXHIBIT "B."

THE WABASH RAILROAD COMPANY.

Auditor's Office, St. Louis, Mo.,.....

Statement of Bills which have been rendered against St. Louis, Kansas City & Colorado R. R. and Adiel Sherwood, Receiver, and which remain unsettled this date.
For Proportion of Expense of Maintaining the Track and Taxes, as provided for by the Decree of December 31, 1886:

Master's Numbers.							
70957	2	For the Month of	May,	1894.	$	288.04	These items were included in bills shown on Exhibit "B" of Original Petition.
72116	3	" "	June,	1894.		237.38	
73376	4	" "	July,	1894.		390.98	
74671	5	" "	August,	1894.		353.49	
76155	6	For the period	Sept. 1-12,	1894.		164.18	
77129	7	Taxes for Jany. 1 to Sept. 12,		1894.		128.48	
76274	12	For the period Sept. 13-30,		1894.		138.39	These items were included in bills shown on Exhibit "E" of Original Petition.
77903	13	For the Month of	October,	1894.		322.07	
79206	14	" "	November,	1894.		215.92	
80478	15	" "	December,	1894.		186.78	
83538	16	For taxes Sept. 13 to Dec. 31,		1894.		64.93	
82595	20	" "	January,	1895.		160.20	These items were included in bills shown on Exhibit "B" of Supplemental Petition.
83530	21	" "	February,	1895.		150.87	
85736	22	" "	March,	1895.		223.85	
87019	23	" "	April,	1895.		536.36	
88690	24	" "	May,	1895.		292.36	
89733	25	" "	June,	1895.		521 13	
91306	26	" "	July,	1895.		260.43	
93223	27	" "	August,	1895.		235.38	
94595	28	" "	September,	1895.		213.37	
96035	29	" "	October,	1895.		278.34	
97563	30	" "	November,	1895.		224.01	
99368	31	" "	December,	1895.		161.09	
1200	33	For taxes for the year 1895.....				222.27	
776	32	For the Month of	January,	1896.		102.87	
2535	34	" "	February,	1896.		139.23	
4075	35	" "	March,	1896.		196.96	
5414	36	" "	April,	1896.		344.57	
7036	37	" "	May,	1896.		312.72	
8392	38	" "	June,	1896.		425.70	
9979	39	" "	July,	1896.		232.82	
11416	40	" "	August,	1896.		215.95	
12781	41	" "	September,	1896.		276.02	
14294	42	" "	October,	1896.		195.37	
15647	43	" "	November,	1896.		167.46	
16904	44	" "	December,	1896.		308.32	
.....	46	For taxes for the year 1896..				216.90	
18439	51	For the Month of	January,	1897.		89.88	
19882	47	" "	February,	1897.		99.52	
21494	52	" "	March,	1897.		118.47	
22921	53	" "	April,	1897.		134.71	
24475	54	" "	May,	1897.		152.36	
26178	55	" "	June,	1897.		230.92	
28131	56	" "	July,	1897.		202.25	
29765	57	" "	August,	1897.		293.96	
31502	58	" "	September,	1897.		140.30	
32532	59	" "	October,	1897.		173.77	
						$10,741.33	

(Filed May 1, 1905, James R. Gray, Clerk).

EXHIBIT "C."

THE WABASH RAILROAD COMPANY.

Auditor's Office, St. Louis, Mo.,.....

Statement of Bills which have been rendered against St. Louis, Kansas City & Colorado R. R. and Adiel Sherwood, Receiver, and which remains unsettled this date.
For Proportion of Expenses of Operation Switching Yard Ewing Avenue, St. Louis:

Master's Number.						
70957	2	For the Month of May,	1894.	$ 483.52	These items were included in bills shown in Exhibit "B" of Original Petition.
72116	3	" " June.	1894.	618.90	
73376	4	" " July,	1894.	817.83	
74671	5	" " August.	1894.	868.90	
76155	6	For the period of Sept. 1-12,	1894.	323.96	
76274	12	For the period of Sept. 13-30,	1894.	484.96	These items were included in bills shown in Exhibit "E" of Original Petition.
77903	13	For the Month of October,	1894.	813.06	
79206	14	" " November,	1894.	862.27	
80478	15	" " December,	1894.	713.88	
89734	19	Wages of Freight Watchman at Compton Ave. and Sergeant of Yard Police. Omitted from previous bills.....		1,024.10	This item was included in Exhibit "B" of Supplemental Petition. Partly distributed over months to which they belong.
82595	20	For the Month of January,	1895.	518.21	These items were included in bills shown on Exhibit "B" of Supplemental Petition.
83530	21	" " February,	1895.	569.00	
85736	22	" " March,	1895.	592.53	
87019	23	" " April,	1895.	617.12	
88690	24	" " May,	1895.	484.26	
89733	25	" " June,	1895.	490.61	
91306	26	" " July,	1895.	517.17	
93223	27	" " August.	1895.	530.24	
94595	28	" " September,	1895.	604.62	
96035	29	" " October,	1895.	777.91	
97563	30	" " November,	1895.	733.69	
99368	31	" " December,	1895.	763.99	
776	32	" " January,	1896.	823.50	
2535	34	" " February,	1896.	503.71	
4075	35	" " March,	1896.	768.82	
5414	36	" " April,	1896.	818.03	
7036	37	" " May,	1896.	926.08	
8392	38	" " June,	1896.	1,045.52	
9979	39	" " July,	1896.	706.00	
11416	40	" " August.	1896.	568.34	
12781	41	" " September,	1896.	546.97	
14294	42	" " October.	1896.	820.25	
15647	43	" " November,	1896.	861.54	
16904	44	" " December,	1896.	732.80	
18439	51	" " January,	1897.	497.30	
19882	47	" " February,	1897.	624.72	
21494	52	" " March,	1897.	594.20	
22921	53	" " April,	1897.	688.86	
24475	54	" " May,	1897.	684.49	
26178	55	" " June.	1897.	616.36	
28131	56	" " July,	1897.	472.55	
29765	57	" " August,	1897.	585.81	
31502	58	" " September,	1897.	417.33	
32532	59	" " October,	1897.	607.60	
18199	45	Wages of train clerks, omitted from from previous bills, year 1896....		324.12	Distributed over months to which they belong.
20032	49	Correction of error in division of yard expenses, Sept. 14, 1894, to December, 1895.....		2,235.78	Ditto.
20031	48	Wages of train clerks, omitted from previous bills, Sept. 14, 1894 to December 31, 1895.....		486.16	These items are included in bills shown on Exhibit "B" of Supplemental Petition.
21096	50	Telephone and telegraph expenses, omitted from previous bills.....		90.29	
18439	51	Correction of error in division of yard expenses, Jan. to Sept., 1896		1,910.81	
				$34,168.67	

(Filed May 1, 1905, James R. Gray, Clerk.)

EXHIBIT "D."

THE WABASH RAILROAD COMPANY.

Auditor's Office, St. Louis, Mo.,.....

Statement of Bills which have been rendered against St. Louis, Kansas City & Colorado R. R. and Adiel Sherwood, Receiver, and which remain unsettled this date.
For Proportion of Expenses and Supplies, Forsythe Junction Station:

	Master's Number.					
17133	84	Supplies, Month November, 1896....			$ 1.98	These items were included in Exhibit "C" of Supplemental Petition.
17134	85	" Months Jan. to Oct., 1896...			5.17	
17237	86	" Month December, 1896....			1.84	
18444	87	Oil, Sept., 1894, to Dec., 1895.....			9.10	
20033	90	Correction of errors, items included in maintenance bills and divided on wheelage.....			293.40	Out.
20245	91	Correction of similar errors.....			84.58	Out.
18439	51	Supplies, Month	January	1897....	17.81	These items were included in Exhibit "B" of Supplemental Petition.
19882	47	" "	February,	1897....	13.09	
21494	52	" "	March,	1897....	1.19	
22291	53	" "	April,	1897....	11.30	
24475	54	" "	May,	1897....	4.83	
26178	55	" "	June,	1897....	.45	
28131	56	" "	July,	1897....	4.61	
29765	57	" "	August,	1897....	.77	
31502	58	" "	September.	1897....	5.59	
32532	59	" "	October,	1897....	1.03	
					$456.74	
				Less..	377.98	
					$ 78.76	

(Filed May 1, 1905, James R. Gray, Clerk.)

EXHIBIT "E."

THE WABASH RAILROAD COMPANY.

Auditor's Office, St. Louis, Mo.,.....

Statement of Bills which have been rendered against St. Louis, Kansas City & Colorado R. R. and Adiel Sherwood, Receiver, and which remain unsettled this date.
For Material Used in Repairs to Cars, Printing Time Cards, etc.:

	Master's Number.			
69519	8	Material for Car Repairs, April, 1894.	$ 5.24	
75485	10	Material for Car Repairs, Aug., 1894.	3.50	
74921	9	Use of Wrecking Outfit, Aug., 1894.	44.00	These items were included in Exhibit "C" of Original Petition.
78073	11	Labor and material making connection at 22nd street.....	61.89	
76103	..	Printing t me cards, Sept., 1894.....	40.00	These items were included in Exhibit "F" of Original Petition.
81814	..	Material for Car Repairs, Dec. 1894.	2.00	
83768	60	" " " Dec., 1894.	.28	
85040	61	" " " Jan., 1895.	.78	
85041	62	" " " Jan., 1895.	1.40	
85042	63	" " " Jan., 1895.	.86	
92873	64	Printing time cards, August, 1895...	34.16	
76	65	Material for Car Repairs, Dec., 1895.	11.20	
1625	66	" " " Jan., 1896.	5.60	
3229	67	" " " Feb., 1896.	2.40	
3238	68	" " " Feb., 1896.	7.76	
4820	69	" " " Mar., 1896.	.80	
5777	70	Printing time cards, April, 1896.....	35.00	
6420	71	Material for Car Repairs, Apr., 1896.	38.49	
6421	72	" " " Apr., 1896.	63.96	
6592	73	" " " May, 1896.	1.50	
8241	74	" " " May, 1896.	37.77	
9567	75	" " " Apr., 1896.	.80	
9974	76	" " " June, 1896.	40.40	
10941	77	Printing time cards July 1896	33.83	These items were included in Exhibit "C" of Supplemental Petition.
11262	78	Material for Car Repairs, July, 1896.	29.60	
12206	79	" " " Aug., 1896.	22.30	
13633	80	" " " Sept., 1896.	11.62	
14987	81	" " " June, 1896.	1.76	
15448	82	" " " Oct., 1896.	32.68	
16865	83	" " " Nov., 1896.	34.76	
19598	88	" " " Jan., 1897.	6.87	
19599	89	" " " Dec., 1896.	33.74	
22183	92	" " " June, 1896.	.38	
22184	93	" " " Nov., 1896.	2.00	
22411	94	" " " Mar., 1897.	4.52	
22518	95	" " " Feb., 1897.	5.06	
24795	96	" " " Apr., 1897.	10.24	
26606	97	" " " May, 1897.	7.70	
27778	98	" " " June, 1897.	9.68	
28135	99	Replacing Slid. Flat Wheels, Jul., 1897	16.50	
29350	100	Material for Car Repairs, July, 1897.	4.73	
30341	101	" " " Apr., 1897.	1.69	
31042	102	" " " Aug., 1897.	4.95	
			$714.40	

(Filed May 1, 1905. James R. Gray, Clerk.)

595 Copy of Intervening Petition of Wabash R. R. Co.; Claim of Intervenor for $37,094.69; against defendants, St. L., K. C. & Colo. R. R. Co., for rental and maintenance under decree of the Circuit Court of the United States for the Eastern District of Missouri, of December 31st, 1886. Same running from April, 1898, to March, 1899. (Filed April 25, 1899.):

Adiel Sherwood, Receiver,
St. Louis, Kansas City & Colorado R. R.,

In account with The Wabash Railroad Company, Dr.

Statement of Bills of the Wabash R. R. Co., against Adiel Sherwood, Receiver of the St. Louis, Kansas City & Colorado R. R., which have accrued since the filing of the Intervening Petition of the Wabash Railroad Co.

This statement being filed in accordance with the Order of the Court, dated March 30th, 1899.

Bills for Rental or Track, etc., between Forest Park and Eighteenth Street, as provided for by the Decree of December, 1886:

Bill No.	Month.	Amount.
39995	April, 1898	$ 2,500.00
41923	May, 1898	2,500.00
43420	June, 1898	2,500.00
45173	July, 1898	2,500.00
47211	August, 1898,	2,500.00
48696	September, 1898	2,500.00
50637	October, 1898	2,500.00
52254	November, 1898	2,500.00
54098	December, 1898	2,500.00
56313	January, 1899	2,500.00
596 57835	February, 1899	2,500.00
59493	March, 1899	2,500.00
		$30,000.00

Bills for proportion of the cost of maintaining the tracks, etc., between Forest Park and Eighteenth Street, St. Louis, Mo., as provided for by the Decree of December, 1896:

Bill No.	Month.	Amount.
34787	November, 1897	$ 178.93
35951	December, 1897	88.47
38053	January, 1898	66.47
39614	February, 1898	70.43
41502	March, 1898	65.71

43162	April, 1898	80.20
45125	May, 1898	203.56
46350	June, 1898	248.68
48632	July, 1898	226.78
50296	August, 1898	231.85
51955	September, 1898	138.04
54344	October, 1898	137.38
55249	November, 1898	111.81
57450	December, 1898	87.70
59031	January, 1899	64.20
62121	February, 1899	87.15
64167	March, 1899	121.99
		$2,209.35

Bills for proportion of Taxes as provided for by the Decree of December, 1886:

Bill No.	Year.	Amount.
47049	1897	$140.64
64393	1898	114.21
		$254.85

597 Bills for proportion of the Cost of Operation of the Switching Yard at Ewing Ave., St. Louis:

Bill No.	Month.	Amount.
34787	November 1897	$ 415.96
35951	December, 1897	161.22
38053	January 1898	126.09
39614	February, 1898	134.95
41502	March, 1898	162.50
43162	April, 1898	117.20
45125	May, 1898	135.40
46350	June, 1898	169.72
48632	July, 1898	294.96
54344	July, 1898	25.04
50296	August, 1898	264.27
51955	September, 1898	264.20
54344	October, 1898	235.99
55249	November, 1898	263.06
59031	November, 1898	53.63
57450	December, 1898	284.85
59031	January, 1899	191.12
62121	February, 1899	320.10
64167	March, 1899	160.35
		$3,780.61

Bills for proportion of Telegraph Expense at Forsythe Junction station, as per agreement:

Bill No.	Month.	Amount.
40765	March, 1898	$ 42.77
42231	April 1898	42.78
43730	May, 1898	42.75
45920	June, 1898	42.96
47605	July, 1898	42.88
598 49195	August, 1898	42.90
51063	September, 1898	42.89
52825	October, 1898	42.89
54613	November, 1898	42.88
56734	December, 1898	43.34
58215	January, 1899	42.50
59982	February, 1898	42.50
63265	March, 1898	43.93
		$ 557.97

Bills for proportion of Cost of Supplies, etc., for Forsythe Junction Station, as per Agreement:

Bill No.	Month.	Amount.
34787	November, 1897	$ 8.75
35951	December, 1897	14.88
38053	January, 1898	4.60
39614	February, 1898	7.25
41502	March, 1898	1.11
43162	April, 1898	10.38
45125	May, 1898	7.27
46350	June, 1898	4.36
48632	July, 1898	.39
50296	August, 1898	.54
51955	September, 1898	1.40
54344	October, 1898	10.50
55249	November, 1898	2.93
57345	December, 1898	16.28
59506	January, 1899	.91
61908	February, 1899	10.24
54125	March, 1899	1.70
		$ 103.49

599 Bills for Repairs to Cars, etc.:

Bill No.	Month.	Amount.
34055	October, 1897	$12.80
34059	September, 1897	15.61
36571	November, 1897	18.36
43145	December, 1897, and Jan., 1898,	13.60

44446	March and April, 1898	7.26
49776	April, 1898	9.52
51595	May, June and July, 1898	13.69
53018	August, 1898	8.89
55142	September, 1898	11.47
57400	November, 1898	12.10
59174	December, 1898	8.76
61309	January, 1899	6.45
63909	February, 1899	6.16
		$144.67

Bills for Rental of Cars, etc.:

Bill No.	Month.	Amount.
45921	May, 1898	$ 5.00
49008	July, 1898	6.00
49011	June, 1898	23.00
57986	Bill for damage to track by Engine No. 1 running through switch at Ewing Ave., Nov. 17, 1898	9.75
		$43.75

Recapitulation.

	For Rental of Tracks, etc	$30,000.00
	For Proportion of Maintenance Expenses	2,209.35
	For Proportion of Taxes	254.85
	For Proportion of Switching Yard Expense	3,780.61
600	For Proportion of Telegraph Expense, Forsythe Junction	557.97
	For Proportion of Supplies, etc., Forsythe Jct.	103.49
	For Repairs to Cars	144.67
	For Rent of Cars, etc	43.75
		$37,094.69

State of Missouri,
City of St. Louis—ss.

E. B. Pryor, of lawful age, being duly sworn, by his oath states that he is the Assistant Auditor of the Wabash Railroad Company, and as such officer, has compiled the above and foregoing account against Adiel E. Sherwood, Receiver of the St. Louis, Kansas City & Colorado Railroad Company, from the original vouchers, books and accounts of the Wabash Railroad Company, now under his supervision.

The affiant further states that said account has been compiled in strict compliance with the Master's report and the judgment of the Court thereon in the case of Luke et al. vs. St. Louis, Kansas City & Colorado Railroad et al., now pending in the Circuit Court of the United States, Eastern District of Missouri.

(Signed) E. B. PRYOR.

Subscribed and sworn to by me this twenty-fifth day of April, 1899.

(Seal) (Signed) JOHN ELLSPERMANN, JR.,
Notary Public, City of St. Louis.

Term expires April 7, 1902.

601 In the Circuit Court of the United States, for the Eastern District of Missouri.

Central Trust Company of New York, et al., Complainants.
Numbers 2357 and 2464. vs. In Equity.
Wabash, St. Louis & Pacific Railway Company, et al., Defendants.

Consolidated.

In the Matter of the Application and Motion of the St. Louis, Kansas City & Colorado Railroad Company, Intervenor.

Depositions of Wabash Railroad Company.

Depositions of witnesses taken on the part of the defendant (to be taken on Thursday, the sixteenth day of February, 1905), by agreement of counsel postponed until Tuesday, the twenty-first day of February, 1905, at the hour of one-thirty p. m.

Depositions of witnesses produced, cautioned and sworn to testify the whole truth, and carefully examined on Tuesday, the twenty-first day of February, 1905, commencing at the hour of one-thirty in the afternoon of that day, at the office of C. N. Travous, Esq., Room 1115 Lincoln Trust Building, on
602 the southwest corner of Seventh and Chestnut streets, in the City of St. Louis, State of Missouri, before me, Everett H. Smith, a notary public within and for the City of St. Louis, State of Missouri, on the part of the defendant in a certain cause now pending in the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein the Central Trust Company of New York et al. are complainants, and the Wabash, St. Louis & Pacific Railway Company et al., are defendants, numbers 2357 and 2464, consolidated, in the matter of the application and motion of the St. Louis, Kansas City & Colorado Railroad Company, intervenor.

Present: Frank Hagerman, Esq., and W. F. Evans, Esq., on behalf of the St. Louis, Kansas City & Colorado Railroad Company, intervenor; C. N. Travous, Esq., on behalf of the Wabash Railroad Company.

William F. Tufts, of lawful age, being produced, cautioned and sworn to testify the whole truth, and carefully examined, deposes and says as follows:

Direct Examination

By Mr. Travous:

Q1. State your name? A. William F. Tufts.

Q2. Where do you live, Mr. Tufts?

A. Moberly, Missouri.

Q3. You are in the employ of the Wabash Railroad Company, are you not? A. Yes, sir.

Q4. Between the 31st day of December, 1886, and—say, July, 1902, what position did you hold with the Wabash
603 Company? A. Clerk for the General Roadmaster.

Q5. Where? A. Moberly, Missouri.

Q6. Do you remember that part of the Wabash Railroad Company between Eighteenth street and Forsythe Junction, say? A. Yes, sir.

Q7. Do you remember the number of the section beginning with Eighteenth street and extending west?

A. Yes, sir.

Q8. What was the number of that section? A. No. 1.

Q9. Do you remember about how far West that extended from Eighteenth street? A. Four miles, I think.

Q10. And from that point to Forsythe Junction, what section? A. No. 2.

Q11. What were your duties as clerk of the General Roadmaster with respect to labor and material employed in the construction or repair of that track?

A. To keep a record of the material and labor.

Q12. From what did you make up those records?

A. Foreman's statements and check rolls.

Q13. What foremen do you refer to?

A. Foremen of Section 1 and Section 2. There were several foremen.

Q14. How were those reports and check rolls procured, by whom were they made out and sent to your office?

A. Section foremen.

Q15. And you made up from those check rolls and reports your records and statements? A. Yes, sir.

Q16. What did you do with the statements you prepared from those reports and check rolls?

604 A. Sent them to the Superintendent of the Division's Office at Moberly or Kansas City.

Q17. Those statements were the ones upon which bills were made? A. Yes, sir.

Q18. In these statements that you made up, did you show the material and labor done upon the different tracks between Eighteenth street and Forsythe Junction?

A. What tracks?

Q19. Tracks; did you show the material used upon the different tracks between those points? Did you separate it?

A. No, sir; I showed material used on joint track or that chargeable to the Colorado Line.

Q20. Well, did your statements also show material used on tracks leading to industries?

A. Not that statement; no sir.

Q21. Not that statement; well, did other statements?

A. Side-track reports showed that.

Q22. So that you made out separate statements covering labor and material toward the payment of which the Colorado Road contributed, did you? A. Yes, sir.

Q23. Well, now, then, what labor and material did those statements cover; that is, labor and material used where?

A. Statements were headed by foreman joint track.

Q24. Well, and it showed what? Showed the material used in joint track between those points, cross-overs, passing track, as I understand it, of the Wabash Company.

Q25. And how about the labor? A. Labor the same way.

Q26. Under your instructions and understanding as to
605 the preparation of those statements of labor and material to the payment of which the Colorado Company was to contribute, was anything included for labor or material in or about any tracks other than those you have mentioned?

By Mr. Hagerman: We object to that as incompetent, irrelevant and immaterial, calling for a mere conclusion and understanding of the witness and not the best evidence, and because it calls for testimony contradicting the stipulations already filed by the parties.

A. Not to my knowledge.

Q27. Under [you] instructions, in the preparation of these statements, what labor and material were you to include?

By Mr. Hagerman: Same objection as made to the last previous question.

It is hereby agreed by counsel that after the testimony of all the witnesses is taken and before the trial of the cause, such objection as the parties want to make as to the competency or materiality of the testimony may be then made with the same force and effect as if made at the time the question and answer were given or propounded.

A. Only that chargeable to the Colorado Railroad Company or their proportion.

Q28. And what, according to your instructions and understanding, was that?

By Mr. Hagerman: I believe I will repeat that same objection because I want to preserve the objection that he cannot testify as to his understanding of the instructions, that he can only testify as to what he actually did.

606 A. Material used in main line, cross-overs, passing track. Labor the same.

Q29. And that applied to the line from Eighteenth street west to where?

A. Why, I should judge at Forsythe Junction; that is where they connect.

Q30. At the point where the two roads connect?

A. Yes, sir.

Q31. And that part of the main track was known as what?

A. Main line.

Q32. Yes; it was known as what? A. Joint track.

Q33. In making out the statements upon which bills against the Colorado Company were based, had you anything to do with the material or labor used about the construction or repair of tracks leading to industries? A. No, sir.

Q34. If any of the statements you made during that period included any material or labor used about the construction or repair of any industrial track, what authority, if any, had you for including it?

By Mr. Evans: That is objected to as incompetent and immaterial, and calling for a conclusion of the witness.

A. No authority whatever.

Q35. Was any such labor or material ever included in those statements made by you intentionally?

A. Not to my knowledge.

Q36. If included, it was the result of what?

A. An error, mistake.

Q37. You may state whether during the period you have mentioned the statements you refer to were generally made out by you in person or by others under your direction?

A. I think they were all personal statements of my
607 own; I think I made that report all the while myself; in fact, I didn't have anybody else to make it.

Cross Examination

By Mr. Hagerman:

XQ1. In December, 1886, what was your position?

A. Clerk, General Roadmaster.

XQ2. And how long did you continue in that position?
A. Ever since, until this last year.
XQ3. Who was the Roadmaster in December, 1886?
A. General Roadmaster?
XQ4. Well, you say you were clerk for the General Roadmaster? A. Yes, sir.
XQ5. Now, who was the General Roadmaster?
A. Well, I was clerk for Mr. McGuigan until he left the Wabash.
XQ6. How long was that, about?
A. I cannot exactly state.
XQ7. Mr. McGuigan was the General Roadmaster part of the time beginning with this date, December 31st, 1886?
A. Yes.
XQ8. And he continued there for about how long a number of years? A. About eight years, I think.
XQ9. And who succeeded him? A. A. S. Haynes.
XQ10. And who succeeded A. S. Haynes?
A. W. S. Newhall.
XQ11. How long was Haynes in?
A. About that time since Mr. McGuigan left until Mr. Newhall came.
XQ12. About how long? Several years?
A. Yes, I think it was several years.
608 XQ13. So that the General Roadmaster during this period from December 31st, 1886, up to July, 1902, was Mr. McGuigan? A. Mr. McGuigan and Mr. Haynes.
XQ14. Mr. Newhall coming in in 1902? A. Yes.
XQ15. Now what were your general duties as clerk to the General Roadmaster?
A. To keep charge—to keep a record of the material and check rolls on the form; we have a printed form, a check roll, not a pay-roll, the foremen reporting the time of themselves and men on it, and distributing the time on the book and the roll to whatever items that they worked at during the month.
XQ16. That is what you call your check roll? A. Yes, sir.
XQ17. Well, now, then, how was the material dealt with?
A. The material is dealt with in this way: That the order is given on the store-keeper and he ships the material to the men and we keep a record of it in the office on his receipt.
XQ18. Now, let me see if I understand it: You had charge of the account you call the report form? A. Yes, sir.
XQ19. And what you call their check rolls?
A. Check rolls.
XQ20. Their check rolls practically representing the labor actually done? A. That's all.
XQ21. The report would include what?

A. We had a tool and material report and reported tools and material—

XQ22. From the foremen? A. Yes.

XQ23. And you had charge of that?

609 A. We had charge of it; we sent it out, a mere matter of form.

XQ24. Now, as I understand, in your position you had charge of the reports that were turned in by the section foremen on the line of the road? A. Yes, sir.

XQ25. And these reports consisted of two things, one the check roll, which was a report of the labor done upon the respective sections, a sort of pay-roll, and the other was a report of the material that was received, the material that was on hand and the material that was distributed by the section foremen? A. Yes, sir.

XQ26. Now, did you have any other duty to perform?

A. Yes, sir.

XQ27. Well, what other duties?

A. To attend to all of the messages that came in in regard to accidents or things of that kind that occurred on the road.

XQ28. The fact of it is that you were a sort of office man for the General Roadmaster? A. That's all, yes, sir.

XQ29. These reports and check rolls that the foremen of the different sections would send in would be sent to the General Roadmaster's office? A. Yes, sir.

XQ30. Now, then, you prepared from those some kind of statements, what were those? A. Well, ties used.

XQ31. Well, I know; what did you get up the statement for to return? Where were they sent?

A. Just to keep a record in the office.

XQ32. That is, from these you would compile a statement to be kept as a statement in your office, and is that what

610 you meant when you said that you prepared these statements? A. Yes, sir.

XQ33. In what kind of a book did you keep those records, or what kind of a record? A. A weekly report.

XQ34. In what form?

A. Well, the monthly report, we didn't take that into account; we kept a daily report and at the end of the week it was checked up and report made to the Superintendent.

XQ35. That is to say, when these reports would come in from the section foremen upon the different parts of the line you would make up a general statement in the shape of a daily report for a record in your own office, and then you would compile that finally in a monthly report? A. Yes, sir.

XQ36. That would be a compilation of the daily reports?

A. Yes.

XQ37. And you kept a record of them in your writing?

A. Yes.

XQ38. And then where would they go finally when you got it up in monthly reports?

A. That would go to the Superintendent's office.

XQ39. Now, to make this plain, I will see if I understand it; each day the section foremen would send in this report, consisting of the two things, the report of the material and distribution, and the pay-roll or the check-roll?

A. Not each day.

XQ40. How often?

A. When they unloaded ties there was a report the day they unloaded them and when they unloaded rails there was a report on that.

XQ41. And then from that you would make up, as those reports came in, what? A. A daily statement.

611 XQ42. And then at the end of the month?

A. At the end of the week we made a weekly statement and at the end of the month a monthly statement.

XQ43. And from your daily statement you would compile from the records of your own office a weekly statement and then it would be forwarded to the Superintendent's office and that was the end of it? A. Yes, sir.

XQ44. Did the weekly report also go to the Superintendent's office? A. Yes, sir.

XQ45. You had nothing to do with making out the compilation? A. No, sir; not at all.

XQ46. And that compilation was just a compilation of what had already been compiled by these section foremen?

A. Yes, sir.

XQ47. You didn't do anything about it except to compile it from their reports? A. That's all.

XQ48. In other words, to compile in abstract form weekly, a compilation of the details after it had been sent in by the section foremen? A. Yes, sir.

XQ49. Where are those statements now; in what book kept? A. I couldn't say.

XQ50. What kind of a book did you keep them in?

A. A daily book; a long time ago.

XQ51. That would answer for your daily reports; did you do the same thing with your weekly compilation?

A. I think so.

XQ52. And how about your monthly compilation?

A. The same thing.

XQ53. Well, can you give any more of a description of the kind of record or book that you kept? A. No.

XQ54. Was it in letter-press form?

A. Sometimes. The daily report was written up on

612 report forms.

XQ55. And then kept in a press-book?

A. Kept in a book—I would not be certain about it, whether it was kept in a book or written in a book.

XQ56. Do you know what book that was, what it was called, so that if we wanted to go and see it we could find it?

A. I don't know whether you could find it or not.

XQ57. Well, do you know what its name was?

A. Simply a daily record.

XQ58. Was it a book kept for that purpose and nothing else? A. Just for that purpose.

XQ59. And then a weekly report was kept in the same book? A. A weekly report was made up and kept—

XQ60. In a letter-press book? A. Yes, sir.

XQ61. And what is the title or name of that book?

A. Well, it was the general book kept, letters, reports of all kinds.

XQ62. Anything else kept besides these weekly reports of the section foremen?

A. Yes, sir; everything that went on, nearly, in that book, outside of the daily reports.

XQ63. Well, now, your monthly compilation; how was that kept?

A. Well, it was kept by reports made to the Superintendent. That it, I don't know the statement any more than we had at that time a tie balance sheet. I didn't keep a rail balance sheet; we didn't have any outside of new rails.

XQ64. Well, now, then, you made out a monthly compilation and sent that in to the Superintendent; now, then,
613 what record did you keep in your office?

A. Whatever record I kept it was in a book.

XQ65. Did you have a record book in which you kept that record? A. It was called a copy book.

XQ66. Just an ordinary impression book? A. Yes, sir.

XQ67. So that you had nothing to do with making up any statements as to the distribution of the material, but simply to compile what had been turned in by the section foremen?

A. In what way? for what road?

XQ68. Upon any section the report and check roll would come in from the section foreman; now you compiled that in the form of a daily statement, reducing it in form to practically an abstract? A. Yes, sir.

XQ69. And the same you did weekly and from monthly statements? A. Yes, sir.

XQ70. That was both labor and material used upon the section? A. Yes, sir.

XQ71. Well, now, what I mean is that you did nothing but compile the statistics that were turned in by these section foremen; you had nothing to do with any distribution of it?

A. No, sir; I did not, except it was specially mentioned.

XQ72. Well, now, as to what matters was there any special mention?

A. Might be that a section foreman on section sent in a report each month separate from his other reports, stating material and labor used on joint track between Forsythe Junction and Eighteenth street at that time; that was a special statement that the foreman was instructed to send in every month.

XQ73. By whom was that instruction given?

614 A. The Superintendent to the General Roadmaster, from the General Roadmaster to the Roadmaster, and the foremen.

XQ74. I want to get your statement correct; then he sent in something besides this report of material and check roll?

A. Yes, sir.

XQ75. That is, on sections 1 and 2 he sent in something different from what he did on other sections? A. Yes, sir.

XQ76. Now, then, just what was that?

A. Well, material used on the main line, cross-overs, side tracks—side tracks, Wabash side tracks that were used by the Colorado, what we called joint track.

XQ77. Have you got one of the forms of that kind of a statement that was sent in during that period that we could use it? A. I don't know.

XQ78. When did you last see one?

A. Well, there's some up in the office; now out of my jurisdiction.

XQ79. Well, I say, when did you last see it?

A. Well, last year; just simply a piece of paper, written on, material used on joint track.

XQ80. Now, everything else that was used outside of that particular statement came included in what you have already spoken of as the report and check roll?

A. Yes, sir; if it was reported.

XQ81. If it was reported?

A. If it was reported, yes, sir, by the foreman on the main line.

XQ82. And these special reports that came in for joint track, cross-overs and passing tracks you followed exactly the same rule as you did the other in making daily, weekly

615 and monthly reports to the Superintendent?

A. No, sir; I did not.

XQ83. How did you do about that?

A. Made the statement up and reported at the end of the month.

XQ84. You only made monthly reports as to those matters?

A. Yes, sir.

XQ85. And the monthly report; you would then send it also? A. Yes, sir; to the Superintendent's office.

XQ86. So that everything that came in from the section foreman in the way of material or labor done upon these sections went to the Superintendent in one form or the other?

A. Yes, sir; went to the General Roadmaster first.

XQ87. How many main—what you call main tracks—were there in section 1?

A. I think there was one at that time.

XQ88. When were there two?

A. Well, they put in two—

XQ89. When was the other one put in?

A. I couldn't say.

XQ90. About when?

A. I couldn't say about that.

XQ91. How many sidings were there in?

A. I couldn't say.

XQ92. Well, passing tracks, you call them?

A. Passing tracks for the yards, as I understand it.

XQ93. Where was that?

A. I think there was one at Ewing avenue.

XQ94. Where else?

A. Well, I don't know where else; I can't state.

XQ95. And how many cross-overs were there and where?

A. There were several between Forsythe Junction and
616 Eighteenth street; I couldn't state where they are. The engineer's office can tell you better than I can about that.

XQ96. Well, now, then, the work and labor that was done upon building the side tracks, where would that be—come to you?

A. That would come in regular form, side track form from the Roadmaster.

XQ97. That is separate from the ordinary work on the section. A. Altogether separate.

XQ98. Well, then, that was simply another report that came in, was it?

A. Oh, yes; that is, of industrial tracks or private tracks.

XQ99. And how would they be reported by the section foreman; that would not be in the general report and the check roll?

A. Ties, including those things, I think, would be reported in the tie book.

XQ100. Would that be upon the general report that you spoke of?

A. That is, what he should report; yes, sir. The report is for that purpose.

XQ101. And the labor would be where?

A. The labor would be on the check roll.

XQ102. So that, if during this time any work or labor was done upon an industrial track it would be reported to your office upon the general report of the section foreman and upon his check roll? A. Yes, sir.

XQ103. And if upon these two particular sections any work was done upon the main track or passing track or cross-over, that would be reported separately? A. Separately, yes.

XQ104. And then you would compile those separate reports into separate compilations and send them into the Gen-

617 eral Superintendent, as you stated? A. Yes, sir.

Re-direct Examination

By Mr. Travous:

RDQ1. How much territory did the General Roadmaster have charge of? A. Western Division.

RDQ2. Embracing all of Missouri?

A. St. Louis to Kansas City. Yes, all of Missouri and all of Iowa.

RDQ3. In replying to Mr. Hagerman's questions you have been speaking of the reports generally sent in from all the section men, have you not?

A. Generally from all over; yes, sir.

RDQ4. Speaking especially of the reports covering this joint track between Eighteenth street and Forsythe Junction, you may state whether, in compiling your statements from the section foreman's reports, it was not part of your duty to separate them so as to show in your statement concerning material and labor on the joint tracks, cross-overs and passing tracks just what material and labor were used in those?

A. It was not my business to separate it from the general report; no, sir. They made a separate report on that.

RDQ5. Well, how did you make out your statement? I am talking about the statement upon which bills against the Colorado Company were based, statements covering materials in this joint track—main track; did that statement show anything concerning the material and labor done on these industrial tracks? A. Not to my knowledge.

RDQ6. Then I ask you if you didn't keep this separate,

618 if you didn't make out separate statements?

A. Why, certainly I did.

Re-cross Examination

By Mr. Hagerman:

RXQ1. As I understand now, so that there will be no misunderstanding about it, that upon these two particular sections the section foreman sent in two kinds of reports? A. Yes, sir.

RXQ2. One report was separate, including the main tracks, cross-overs and what you call passing tracks?

A. That is what we call joint track; we had instructions describing joint track and what was not.

RXQ3. What you call joint track you designate main track, cross-overs and passing tracks, that came in from the section foremen in separate form? A. Yes, sir.

RXQ4. That you compiled and sent in as separate statements? A. Yes, sir.

RXQ5. He also sent in, as time progressed during the course of his duties, all the other work and material that were expended upon the section and that you compiled separately and sent in to the Superintendent's office? A. Yes, sir.

By consent of the parties, witness' signature to the deposition is waived.

By consent of the parties, the taking of further depositions is adjourned until ten o'clock in the forenoon of Monday, February 27th, 1905.

Pursuant to adjournment met on Monday, February 27th, 1905, at same office, at the hour of ten in the forenoon, and the following proceedings were had:

619 Present: Frank Hagerman, Esq., on behalf of the St. Louis, Kansas City & Colorado Railroad Company, intervenor; C. N. Travous, Esq., on behalf of the Wabash Railroad Company.

B. F. Taylor, of lawful age, being produced, cautioned and sworn to testify the whole truth, and carefully examined, deposes and says as follows:

Direct Examination

By Mr. Travous:

Q1. State your name, Mr. Taylor? A. B. F. Taylor.

Q2. Where do you live? A. Truesdale is my home.

Q3. For what company are you working now?

A. For the Wabash.

Q4. At what?

A. In the Track Department; well, I may call it the Bridge Department now, since the 28th of November.

Q5. Are you the same B. F. Taylor whose deposition was taken in this case November 4th, 1903? A. Yes, sir.

Q6. You stated in that deposition that you had worked as section foreman on section No. 1, extending from Eighteenth street in the City of St. Louis to a point just west of the Forest Park tunnel? A. Yes; mile post 4.

Q7. Mile post 4—from July, 1898, to July, 1901, I believe? A. Yes, sir.

Q8. You stated that during that period you and the section men under you constructed certain industrial tracks and also kept industrial tracks in repair? A. Yes, sir.

620 Q9. You also spoke of reporting to the General Roadmaster monthly the labor and material used in the main tracks? A. Yes, sir.

Q10. State whether you also reported labor and material used in the repairing and construction of tracks leading to industries?

A. No, sir; not reported at the end of each month, but we used another roll for time and material used on off tracks, off the main line of the Wabash.

Q11. State whether that was reported separately from the labor and material used in the main track work?

A. Yes, sir; separately; made to itself.

Q12. After you made those reports, state whether any representative of the Colorado Company would see you about them? A. Yes, a fellow named Mr. Waters; with the Roadmaster of the Colorado.

By Mr. Hagerman: The Roadmaster, was it?

A. Yes, sir.

By Mr. Travous, resuming:

Q13. What would he do? A. Why, he is the Roadmaster.

Q14. What did he do in connection with you or this main track work?

A. Well, he would bring the bill of material around and the labor was on the main line, and I would show him what material was used in the main line and off tracks of the Wabash on the main lines around Ewing avenue.

Q15. State whether that included cross-over tracks on the main line? A. Yes, sir; yes, sir.

Q16. And passing tracks? A. Yes, sir; passing tracks.

Q17. Well, state what you and he did with reference to checking up your reports in regard to that work for the

621 month, for each month—say?

A. Well, he brought the bill around, you know, the bill that I turned in every month, separate roll, the labor and material only what was charged against the Colorado, and he would check this material up and I would show him, and after that he would go on away and I would not see him any more until the next month.

Q18. Do you remember the first time that he called on you and asked you to go with him and check up the bill?

A. It was the first month I came to St. Louis, in July, I think it was, '98, to my best recollection about it.

Q19. State what you did at that time with reference to going with him, or objecting?

A. Well, I objected to going with him there and I wrote to Mr. Burke, the Roadmaster on the Wabash, and told him, and he sent me a letter to go with him and show him where this material was used and the labor and everything on the tracks on the main line.

Q20. You may state, if you know, whether the bill he had with him was a copy of the report you sent in regarding the work and material on the main line?

A. Yes, sir; it was the bills.

Q21. What, if anything, did he ever do or ask you to do regarding any work or material used in tracks leading to industries? A. Why, he never asked me anything about those.

Q22. Do you know of his doing anything in respect to checking up any work or material in tracks leading to the private industries?

A. No, he never checked any of those tracks.

Q23. What were your instructions with reference to
622 what work and material was to be charged in part to the Colorado Company, if any?

By Mr. Hagerman: We object to that as incompetent, hearsay evidence and not bearing upon any issue here.

A. Main line.

Q24. You stated in your former deposition that the switch-stands used in the main line when you were there were the high stands, the Elliott stands. Please state whether—what kind of switches were used in the cross-overs, if you remember?

A. Well, they were high stands, all but two, that is Ewing avenue, there was low stands there.

Q25. You mean at Ewing avenue cross-overs?

A. Yes, sir.

Q26. What kind of frogs were used in cross-over and passing tracks, if you remember?

A. Well, there were 9's and 7's and 6's.

Cross Examination

By Mr. Hagerman:

XQ1. Where are you working now? A. Wright City.

XQ2. Whereabouts is that?

A. That's fifty miles west of here.

XQ3. Your position is what?

A. Foreman in the Bridge Department now.

XQ4. How long have you been engaged in that?

A. Since the 28th of November.

XQ5. That is for the Wabash?

A. Oh, with the Wabash Company, you mean?

XQ6. Well, now, before that, what was your employment before you went in the Bridge Department?

A. As track foreman.

623 XQ7. With the Wabash?

A. I was on the Trunk for two years, and came back with the Wabash, was with the Wabash about fourteen years.

XQ8. Well, at the time your deposition was taken?

A. My deposition was taken before; I was with the Grand Trunk—

XQ9. How soon after that did you come back with the Wabash?

A. Well, I went to work for the Wabash the seventh day of November, 1893, after I came back here, I think it was.

XQ10. That was within two or three days after your deposition was taken? A. Yes, sir.

XQ11. And what position did you go in then?

A. I went in the Track Department.

XQ12. And you have been working for the Wabash ever since. A. Yes, sir.

XQ13. How long after your deposition was taken was it before you made your arrangements to go with the Wabash again?

A. Well, I was going back on the Trunk—I struck a job here again.

XQ14. How long after your deposition was taken before you made your arrangements about the job?

A. With the Wabash? The sixth day of November.

XQ15. Now, with whom did you make it?

A. Mr. Nietmann.

XQ16. What is his position?

A. He is Division Roadmaster.

XQ17. And how did you come to make it?

A. Well, I just asked him to work; he needed a man and he put me on extra again at Gilmore.

XQ18. Did he send you over?

A. No, sir; I came in over the Rock Island.

XQ19. You came here as a witness for the Rock Island,

624 you say; well, what was the occasion for your going to the Wabash, then?

A. I couldn't do anything; I couldn't afford to lie around.

XQ20. You were in the employ of the Grand Trunk at that time A. Yes, sir.

XQ21. How came you to go to this Wabash man to get employment?

A. I didn't quit the job up there. The Grand Trunk was about to close, then the extra gang was all knocked off, and I

didn't think it was any use to go there for two or three months, and I went to work for the Wabash.

XQ22. Now, before that, you had worked for the Wabash from July, 1898, until about July, 1901, in the neighborhood of three years? A. Here at St. Louis?

XQ23. Yes? A. Yes, sir.

XQ24. On this particular section 1? A. Yes, sir.

XQ25. Between Ewing avenue and Forest Park?

A. No, Eighteenth street.

XQ26. Eighteenth street? A. Eighteenth street.

XQ27. And your position was what? A. Foreman.

XQ28. Track foreman, or section foreman, or what?

A. Track foreman, or section foreman, or whatever you call it.

XQ29. Your duties were to perform the ordinary duties of a track foreman? A. Yes, sir.

XQ30. You had nothing to do with making any charge against anybody? A. Yes, sir.

XQ31. Well, let's see exactly what you did?

A. Well, if any work was to be done in a man's track,
625 off track there, I would go and look at it and see how much it cost, and material it would take to repair it and send in a bill for it.

XQ32. I don't know as you understood me, Mr. Taylor. You did whatever work was necessary to be done in repairing and keeping in repair with your section men? A. Yes, sir.

XQ33. The main track upon your section? A. Yes, sir.

XQ34. And the side tracks upon your section?

A. Yes, sir.

XQ35. And whatever you did in that respect you would send in your reports to the headquarters—that is, as much as you had to do with them?

A. I looked after the Company's tracks, until I had orders to go with somebody else's tracks to the Company.

XQ36. I don't know as you understand; you had nothing to do with what, or to whom, the Company itself would make any charge for work that you did; you simply did certain work and reported the time of your men and the material back to the Company? A. Yes, sir.

XQ37. And then it was somebody else connected with the Company that distributed that to whomever they wanted to make the charge to?

A. This is only Company work that I charged, anything occurring, you know, and I didn't do any off work unless I had orders from the Company.

XQ38. Well, you don't understand what I am asking you. You didn't have anything to do with deciding who was to be

charged with any of your work; all that you did was to do the work and make these reports that you speak of back
626 to the Company?

A. That's on Company's tracks.

XQ39. Well, on any other tracks?

A. Yes, sir; on any other tracks.

XQ40. You made the report to the Company?

A. Yes, sir.

XQ41. Well, what I want to know, is, did you have anything to do with making any charge against anybody on earth for what you did? A. Yes, sir.

XQ42. Well, let me understand what you did?

A. Well, if there was any new work to be done in the tracks, or private tracks, as we call them, I got orders from the Company to bill; when the first car was put in, I turned the bill in.

XQ43. Anything more?

A. Yes, sir; at the end of the month I would make a bill or list of all the names and material used on the main line; this stuff was cut off the Company's rolls altogether; it was not carried on the Company's rolls at all.

XQ44. What stuff?

A. The material or labor, it was put on separate rolls itself.

XQ45. Well, I can't make him understand. When you did any work upon the main tracks, it was sent in with your report monthly or weekly or whenever you sent it in?

A. Yes, sir.

XQ46. Just what you did, which included the number of men working and the materials; that you did? A. Yes, sir.

XQ47. Now, that was the end of it as far as you were concerned? A. For that one report, yes.

XQ48. Now, you had nothing to do with it after you sent in the report of what you did? A. Yes, sir.

XQ49. Well, let us see what else you had to do; I am
627 asking him about, now, the main track.

A. Well, I don't know—

XQ50. Well, now, we will start again; so you just listen and see if you understand the question. As you did any work upon the main track, what you call the main track, and the passing tracks, the amount of material that was used by you, and the labor that was performed on that, was reported by you to the Company? A. Yes, sir.

XQ51. Now, we are talking about the main tracks; now, after you sent in that report representing the amount of material used and the labor, you had nothing more to do with it?

A. Not that report; no, sir.

XQ52. Or about that work? Somebody else decided how it was to be charged by the Company, and not you?

A. Oh, yes, certainly.

XQ53. Now, then, when you did any work upon the side track, what did you do?

A. Do you mean the Company track or private track?

XQ54. Well, did you make a separate report as to Company side tracks and as to private tracks?

A. Well, now, I am not certain, but we did on our payroll, we checked it off, side tracks and main line and private tracks.

XQ55. What did you call the side tracks of the Company, as distinguished from the private tracks?

A. Well, off the main line.

XQ56. Do you refer to side tracks as the passing tracks?

A. Well, it's the same thing; we always call them passing tracks and off tracks, side tracks.

XQ57. Side tracks in addition to private tracks?

A. Yes, sir.

628 XQ58. That you call Company tracks? A. Yes, sir.

XQ59. Well, now, what report, if any, did you make as to the side tracks, not counting those going to private industries?

A. Well, it was checked on the rolls, the main line work and the side track work.

XQ60. In what respect was it checked?

A. Well, it was just where—back, of your roll, you charged so much to the main line and so much to the passing track and so much to the off tracks.

XQ61. I hand you now the original check roll for labor performed on Section No. 1 for the month of November, 1898, certified to by Benjamin Taylor; that was yourself, wasn't it?

A. Yes, sir.

Counsel hands witness the Exhibit and request that it be marked Taylor's Exhibit "1" to this deposition.

XQ62. That, now, contains on its face the list of laborers, including yourself, with the amount due from the Company?

A. Yes, sir.

XQ63. For the labor? A. Yes, sir.

XQ64. And on the back of that in printed form was an account that you called "classification of labor"? A. Yes, sir.

XQ65. That is to say, you filled out that classification as to indicating how much of it went to one of the particular classes there named?

A. Well, that went to the Wabash; that is where I sent my reports.

XQ66. But in this classification of labor on the back, you made the distribution as to the character of the work or what particular thing it was done on? A. On Company tracks.

XQ67. Well, take this sheet, for instance; the total amount of labor, including your own services, was $388.75. In
629 your classification you have that carried forward to repairs, roadway and track? A. Yes, sir.

XQ68. The whole amount? A. Yes, sir.

XQ69. Well, now, what did that mean?

A. That meant the Company tracks.

XQ70. What you mean to say, then, is that upon this report you only included the work that was done upon Company tracks?

A. Well, that's all; that's what that roll showed.

XQ71. That is, this Exhibit Taylor No. "1" was the form of the check roll with the classification as to what you call Company tracks?

A. Well, all work done during the month was on that roll.

XQ72. Yes; well, now, then, do you mean to say that all the work that was done, whether upon industrial or side tracks or Company main track and passing track, appeared on that check roll? A. On that roll.

XQ73. Now, then, did you have any other check roll or any other form of check roll? A. Yes, sir.

XQ74. What was that? A. The same kind of roll as that.

XQ75. Well, can you produce any such check roll, that we could see it?

A. I don't know; probably that roll you took out there was along with it. It was checked off of that.

XQ76. The paper to which you refer is now marked Taylor's Exhibit No. "2" and that is a similar check roll, in which you checked from that account the portion of the labor that is apportioned to the part of your section that was west of Forsythe Junction? A. Yes, sir.

630 XQ77. Now, what other report or check roll as to labor did you send in?

A. Well, that's all the report outside of when—unless we were doing work on the off tracks, the tracks not belonging to the Company, then we made a bill for that; sent it in to the Company.

XQ78. Can you produce one of those, so that I can see the form of it?

A. No, sir; I can't; I haven't got any of them.

XQ79. But there was some other check roll?

A. No, sir; it was just a—you have got one there—well, that ain't it; that's just material and stuff used; yes, that's material.

XQ80. Well, did you have any form for this other matter of which you speak, or report?

A. Only new work on off tracks.

XQ81. That is, work of constructing an industrial track? A. Yes, sir.

XQ82. That would be the only thing that would be separately reported? A. That would be the only thing.

XQ83. Whenever you constructed a new track you would make a separate report? A. Yes, sir.

XQ84. That makes three kinds of reports that you sent in, your check roll, that covered all the labor for the month, didn't it? A. Yes, sir.

XQ85. And then a separate check roll as to the proportion of that—that really went in west of Forsythe Junction?

A. No, sir; we made an extra roll there, checking the amount off our first roll—of all that.

XQ86. Exhibit Taylor No. 1 covers the entire amount
631 of labor, for your whole section or the sections under your charge? A. Yes, sir.

XQ87. Including you and your section men, all the labor wherever it was performed during that month, was included in that? A. In the first roll.

XQ88. Now, Exhibit No. 2, you make a separate statement, showing how much of that went in west of Forsythe Junction?

A. Well, that's all the work we done outside of the main line; we had no private work that month; if we had we would have made another roll between that and Forsythe Junction.

XQ89. Exhibit No. 2 represents the portion of the labor that was done west of Forsythe Junction? A. Yes, sir.

XQ90. Although it had been included in the total contained in Exhibit No. 1? A. Yes, sir.

XQ91. Now, when you constructed an original side track leading to some private industry, did you send in another check roll as to that?

A. No, sir; it was carried on the kind of roll like you got there, the amount of labor was taken off the main line and carried on that, an extra roll, that roll we carried full.

XQ92. Exhibit No. 1 was all the labor; Exhibit No. 2 was the portion of that labor west of Forsythe Junction; now, then, if you constructed a new side track you had an additional roll which you sent in? A. No, sir.

XQ93. Well, what did that additional roll show?

A. The same as that?

XQ94. As No. 2?

A. The same as No. 2—the 2 then we worked out west of Forsythe Junction.

XQ95. Well, then, you would have on that report the
632 portion of the labor that was in form like Exhibit No. 1; that was put upon the construction of this side track?

A. It would be on No. 2 roll.

XQ96. On the same roll as west of Forsythe Junction?
A. Yes, sir.
XQ97. That is, you would include it in No. 2?
A. Yes, sir; because that was Company's work.
XQ98. Now, that covers all the report that you would make of labor? A. Yes, sir.
XQ99. Now, then, how did you report as to material; was that in the form marked Exhibit No. (Taylor) "3" for November, 1898; look at that; or did you have a special form?

(Hands Exhibit to witness, and asks that it be marked Taylor's Exhibit No. 3.)

A. This is material used on the main line, the Company tracks; on Company tracks, east of Forsythe Junction.
XQ100. Well, this report don't say that it was anything except material and tools used on the section 1 east of Forsythe Junction? A. Yes, sir.
XQ101. Now, then, if any material or tools were used in the construction of a new side track?
A. Well, the same tools were used, labor and tools, that were on this side track.
XQ102. Would you make a separate report as to that, as to labor and material that were used upon the construction of a new industrial track separate from this statement as shown in No. 3? A. Yes, sir.
XQ103. Now, would the form of the statement No. 3, like the form of the check roll No. 1, include in the first instance all the material that was used and then the other one that you sent in as to the industrial track be taken from it, like in the
633 case of the check roll?
A. I think that this is the report; it has been so long—
XQ104. We want to get at the way you did it?
A. I haven't any.
XQ105. Now, Mr. Taylor, you understand that when you sent in your check roll for labor as shown by the form No. 1, that included all the labor that was performed? A. Yes, sir.
XQ106. Then you sub-divided it by separate reports showing what part of it went west of Forsythe Junction and what part of it went in the construction of an industrial track and made separate reports of that; now did you do that way in the material you sent in, one account representing all the material, and then sent in a separate one showing the part that went to the construction of the industrial track, or do you remember about it?
A. Why, just the same as we got that way—you see that roll would work west of Forsythe Junction, or east.
XQ107. Roll No. 2 is taken out?

A. That roll was supposed to take the labor off the main line and to be charged against the Colorado Road, that is what that roll was meant for.

XQ108. Your first roll No. 1, included all the labor, no matter whether it was done on the part of the road that was occupied by the Colorado Road or not; it included all?

A. It included all.

XQ109. And No. 2 was made up to show what portion in No. 1 was west of Forsythe Junction?

A. Well, that was both sides. You know, either side, this side of Forsythe Junction, or west of Forsythe Junction, it was off work, off the Company's tracks, if we had any pri-
634 vate tracks out—we would make a roll like that.

XQ110. No. 2 was not in addition to No. 1, but showed the amount of labor that was done west of Forsythe Junction?

A. From Eighteenth street out.

XQ111. All that I am trying to get at is to have you tell me whether or not your No. 1, as I have understood you to say repeatedly, covered all the labor, no matter where it was done; now, No. 2, where it says "labor performed west of Forsythe Junction," represents the portion of the labor in No. 1 that was done west of Forsythe Junction? A. Yes, sir.

XQ112. Well, now, did you have an addditional check roll that you sent in showing the portion of No. 1 that was done, for instance, upon these industrial tracks?

A. No, sir; it all went on that roll No. 2 you got there.

XQ113. That is to say, if any work was done east of Forsythe Junction upon an industrial track or anything outside of your main tracks, it would be put on this No. 2 so that No. 2 sheet that went in would cover the work that was done west of Forsythe Junction, as well as that done east of the Junction not upon the main track; is that right?

A. Well, I will tell you, what we used to call—whenever we got west of Forsythe Junction we called it west of Forsythe Junction; that was work; then we had to make an extra roll there if we got in the town; then I only made one roll; I did nothing else; it was all Company work.

XQ114. If you did any work west of Forsythe Junction you made a roll like No. 2? A. This side.

XQ115. Let us separate them. If in any month you didn't do any work except east of Forsythe Junction on the
635 main line there would not be any check roll except such as is in form of No. 1?

A. Yes, sir; there would, unless we were right on the main line all the time.

XQ116. Well, if you were on the main line there would not be anything except like report No. 1? A. Yes.

XQ117. Now, then, if you did any work west of Forsythe Junction, you made up a sheet like No. 2, indicating what portion that was contained in No. 1 that was chargeable to that portion of that track. I am asking you about No. 2, which was headed "West of Forsythe Junction." That is true, wouldn't it be? Supposing in any month you didn't do work except on the main track, that was all you did now, on the main track? A. Yes, sir.

XQ118. When part of it was west of Forsythe Junction, then you sent in a form like No. 2?

A. Yes, if I worked west of it I would, if I worked on this side of it, I would also.

XQ119. You would make up another roll similar in substance to No. 2 for that amount of work, or would you just include it in the roll for the work done west of Forsythe Junction? A. The one roll would cover both jobs.

XQ120. That is, a roll practically on the lines that No. 2 was gotten off? A. Yes.

XQ121. That is, if in any month any work was done in the construction of an industrial track, you would make a statement of that in a sheet that was prepared like No. 2 that you produced? A. Yes, sir.

XQ122. Now (Taylor's) Exhibit No. 3 purports to be the material and tools used for November, 1898, and would
636 you, like in the case of check roll, send in one report for all the materials and tools used, no matter where, and then make a subdivision as to materials like you did as to labor?

A. I made a tool report outside of that report.

XQ123. Well, what was the one outside report, like No. 3?

A. Just the report that the tools was on hand; that is, tools received.

XQ124. Now this is material and tools used on section 1 east of Forsythe Junction?

A. Yes; that's what was used on the main line.

XQ125. Did you make any other report as to material?

A. No, sir.

XQ126. What would you do when you got material and tools that were used on an industrial track?

A. I would make a report of them that went right in when the track was built. I am just talking about the end of the month reports; that's at the end of the month.

XQ127. This would include, then, for the work during the month, everything except at the time when there was original construction of an industrial track; how would that material be reported?

A. We would make a bill out, material and everything used; we would not carry it in our monthly report at all.

XQ128. Would not that go on a monthly report?

A. No, sir.

XQ129. The labor went in?

A. The labor was put on roll No. 2.

XQ130. But the material would not go in the general material report? A. No, sir.

XQ131. How did you do when you repaired any of these industrial or side tracks; what reports did you make?

637 A. We got an order from the man to repair his tracks.

XQ132. You got an order from him?

A. The man the track belonged to—where it belonged to.

XQ133. And what would you do now about making report?

A. Well, I would just charge him up with labor and material.

XQ134. And what would you do with it?

A. Turned it in; the General Roadmaster first; we did first to Mr. Nietmann, and he turned it in the General Office.

XQ135. Well, now, was that material included in your general material report? A. No, sir.

XQ136. And then separated or was a separate report made of that in each instance and not included in your general material report?

A. We never reported it any more if we used it in the industrial tracks.

XQ137. In your original deposition you said that nothing but the high switchstand, the Elliott stand, was used on the main line. Do you say you want to change that statement?

A. Do you mean—well, there was at the cross-over, I remember, in the—at Ewing avenue, there were low stands there.

XQ138. How many? A. Two.

XQ139. Any place else?

A. That's the only place that I know of; well, there were double cross-overs there; the other one had the pony stand there; that is a stand not quite as high as the high stand; the same kind as the Elliott stand.

XQ140. Well, the high stand now used on the main line was the only kind used except at some place there at Ewing avenue?

A. Yes, sir.

638 XQ141. Now, how many stands were there that were not the high Elliott stands? A. Off the main line?

XQ142. On the main line?

A. Well, there was only two; there is a pony stand there, a high stand; two pony stands and two ball stands on the double cross there east and west on Ewing avenue.

XQ143. And is that what you call on the main line?

A. Yes, sir.

XQ144. But outside of that high stand, the Elliott stand was alone used upon the main track? A. Yes, sir.

XQ145. Now, in your testimony you were asked these questions in your deposition, and made these answers: "Q. What about frogs; what number of frogs were used in the main line? A. No. 9's." "Q. Was No. 9 used all the time? A. All the time." Do you want to change that?

A. Well, there was 6 and 7 used.

XQ146. Where? You said then nothing but No. 9 were used in the main line; now you want to change it?

A. Well, we used 7 if we changed in rolling the steel there and got the 6, I think, No. 6 frog.

XQ147. Where did you use any No. 7?

A. Well, we used them out on that outbound track, out on Boyle avenue. There is one 7 there leading in that lumber works at Newstead avenue.

XQ148. One 7? A. Yes, sir.

XQ149. Where was that put in? A. Newstead avenue.

XQ150. That is one now; where was any other?

A. I couldnt mention the rest of them.

639 XQ151. Well, can you mention any other?

A. No, sir.

XQ152. Well, why then, do you change your testimony from the way you gave it?

A. Well, I just thought about it now, I guess, it's pretty hard for a fellow to think about a thing five or six years.

XQ153. Still, when you testified before, you said positively the No. 9's were the only kind used on the main line; now you say you want to change it, and at Newstead avenue there was one No. 7? A. Yes, sir.

XQ154. Where else can you remember that there was any No. 7 used? A. I couldn't tell.

XQ155. Can you tell any place where No. 6 was used?

A. At Vandeventer avenue.

XQ156. One? A. One.

XQ157. Any place else?

A. That's the only place I know.

XQ158. Where were these frogs, that you speak of put in the track?

A. Well, they were put in all the way from mile post 4 to Eighteenth street.

XQ159. Well, in frogs and switches, what did you call the point of the switch and the heel of the frog?

A. The heel of the frog is the lowest end of it.

XQ160. And the point of the switch is what?

A. Is the switch point.

XQ161. That is where it touches the track? A. Yes, sir.

XQ162. Now, these cases where you said the 7 and 6 were put in, at what point, at the point of the switch or the heel of the frog?

A. The location of where the frog is?

XQ163. Yes?

A. Around the switch there at Newstead avenue.

640 XQ164. Well, I know, but this frog, that you speak of, would that go in at the heel of the frog or the point of the switch?

A. The point of the frog; if you got it right in at the heel you couldn't put the whole of the frog in the heel.

XQ165. Where would it go in?

A. Wherever you located the switch, wherever the frog was supposed to be set; you cannot put the switch of the frog and the point together.

XQ166. You haven't gone over any of the accounts or reports which you turned in during the period that you were there? A. No, sir.

XQ167. And those reports were sent in where?

A. Sent in to Moberly.

XQ168. To whom? A. To Mr. Haynes.

XQ169. The Roadmaster? A. Yes, sir.

XQ170. And how often would your reports go in?

A. Once a month.

XQ171. That is, as section foreman, you would only make monthly report? A. Yes, sir.

XQ172. You didn't make any daily report? A. No, sir.

XQ173. You didn't make a weekly report?

A. I made a weekly report.

[—] A weekly report? A. Yes, sir.

XQ174. What was the form of that report?

A. A small report, similar to tool report, the amount of men you would work and the material used.

XQ175. But it was not a complete roll showing the time?

A. No, sir; just a weekly report.

XQ176. That would be nothing that an account could be made up from? A. No, sir.

XQ177. That was just a general statement showing—

641 so that the Roadmaster could keep the general run of things as to about how many men you were working?

A. Yes, sir.

XQ178. The detail report that showed the time that was put in by the men? A. Yes, sir.

XQ179. And the money that was paid to them?

A. Yes, sir.

XQ180. Now, did you send in material reports other than the monthly report? A. At the end of the month?

XQ181. Yes, material report? A. Yes, sir.

XQ182. What was that?

A. That was material—you have got it there now.

XQ183. I know, No. 3, Taylor's Exhibit No. 3, that's the end of the month? A. Yes, sir.

XQ184. What? Did you send in a material report except for the whole month?

A. Which you mean—the weekly.

XQ185. Would you send in a weekly or daily report?

A. Oh, I sent in a monthly tool report that the tools were on hand.

XQ186. A monthly material report?

A. No, sir; only No. 3.

XQ187. Well, No. 3 is the material and tools used for the month? A. Yes, sir.

XQ188. Well, did you send in a weekly or a daily report as to the materials of that kind?

A. I sent in a weekly report.

XQ189. In that form that you have?

A. We had a regular weekly report of the material used and received.

XQ190. That was in addition to this monthly?

A. Yes, sir.

642 XQ191. Why did you send them in weekly and monthly both? A. That was our orders from the Company.

XQ192. Now, I hand you check roll for July, 1900, marked Taylor's Exhibit No. "4"; that is your report for that month of all the labor? A. Yes, sir; that's the report.

XQ193. Now, that is like No. 1? A. Yes, sir.

XQ194. For all the labor that was done? A. Yes, sir.

XQ195. What is the total amount of that given there? The total of the amount of that labor, including your own services, was $355.00? A. Yes, sir.

XQ196. (Taylor's Exhibit No. 5) No. 5, now is the report for material for the week ending July 14th, 1900, made by you; is it for that month? A. Yes, sir.

(Hands witness Exhibit and asks that it be marked Taylor's Exhibit No. "5.")

XQ197. That has a notation in your hand-writing, has it not, "six days' laying new track at Newstead avenue"?

A. Yes, sir.

XQ198. Where was that track at Newstead avenue?

A. Why, it was at Polar Wave.

XQ199. That is, leading to a private industry?

A. Yes, sir. I think there is Ludlow-Saylor there, but—

XQ200. Well, that's a private industry? A. Yes, sir.

XQ201. That means that there were six days' work laying a new industrial track at Newstead avenue, that notation in pencil that you made there?

643 A. Yes, sir; I guess that's what it means—either one of those other tracks.

XQ202. Now, then, I hand you as (Taylor's) Exhibit No. "6" the weekly report that you made of material used and labor performed on section No. 1 for July 21, 1900; that is upon the form that you spoke of about your weekly reports, was it not? A. Yes, sir.

(Hands witness report and asks that it be marked (Taylor) Exhibit No. "6.")

XQ203. And that's the original report that you made for that week? A. Yes, sir.

XQ204. That has, for this section 1, this notation in your writing: "2 days' repairing track; 4 days' putting in new track for—" A. Polar Wave.

XQ205. Polar Wave; that's an industrial track, is it not? A. Yes, sir.

XQ206. Now, I hand you as Exhibit (Taylor) No. 7 what purports to be a report of material used and labor performed on section 1 for week ending July 31st, 1900. That is your original report for that week, is it not? A. Yes, sir.

XQ207. Upon your regular form? A. Yes, sir.

XQ208. That shows in your own hand-writing on this section 1 "4 days repairing track, 5 days putting in tracks for Polar Wave," does it not?

A. Well, that's the end of the month, I guess, the windup of the month, nine days—laboring days.

XQ209. That shows for the industrial track? A. Yes, sir.

XQ210. Now, in that report—there was no other report as to industry tracks for that period of time except as con-

644 tained in those papers that you know of, is there?

A. No, sir; not that I know of.

(Hands paper and requests that it be marked (Taylor's) Exhibit "7.")

XQ211. I hand you as (Taylor's) Exhibit "8" the check roll for January, 1901.

(Hands witness paper and requests that it be marked (Taylor's) Exhibit No. "8.")

A. That's the regular monthly check roll.

XQ212. Containing all the labor on that month, no matter where done? A. Yes, sir.

XQ213. The full amount of which was $328.75?

A. Yes, sir.

XQ214. With this check roll is what purports to be report of material used and labor performed on section 1 for the week

ending January 31st, 1901 (which is marked Taylor's Exhibit "9"): That is your original weekly report? A. Yes, sir.

XQ215. Now, that has in your own handwriting hasn't it, "6 days repairing track, 3 days relaying track for Heinrichs?"

A. Well, that's right.

XQ216. Now, Heinrichs was a private industrial track?

A. Yes, sir.

XQ217. Whereabouts? A. Vandeventer avenue.

XQ218. That is the Heinrichs Coal Company? A. Yes, sir.

XQ219. Accompanying this statement is, I find a letter from A. S. Haynes to Mr. Nietmann, dated January 27th, 1901. Who was Mr. Haynes? A. General Roadmaster.

XQ220. And who was Mr. Nietmann?

A. Division Roadmaster.

645 XQ221. And you know their signatures, don't you?

A. Yes, sir.

XQ222. That is Mr. Haynes' signature to that letter?

A. I never seen the letter.

(Hands witness letter and asked that it be marked (Taylor's) Exhibit "10.")

A. That's Mr. Haynes' signature.

XQ223. And is the accompanying letter attached to it Mr. Nietmann's signature? A. Yes, sir.

(Hands witness paper and requests that it be marked (Taylor's) Exhibit No. "11.")

XQ224. I hand you as Exhibit (Taylor) No. 12 your general check roll for March, 1901, the total amount of which is $336.25; please look at that and tell me if that is the original of all your labor that month?

A. Yes, sir; that's the monthly report. Monthly check roll.

(Hands witness exhibit and asks that it be marked (Taylor's) Exhibit No. "12.")

XQ225. Now, with that appears to be the report of material used and labor performed on section 1 for the week ending March 31st, 190— (which is marked Exhibit (Taylor) 13); that is your original report, weekly report, for that week, is it not?

A. Yes, sir.

(Hands witness paper and requests that it be marked (Taylor) Exhibit No. "13.")

XQ226. That shows in your handwriting what?

A. Well, there is 2 days time in repairing side tracks, 6 days grading and laying new side tracks at Sarah street.

XQ227. Now, the only new side track at Sarah street
646 was the track to the Empire Brewing Company, was it not? A. Yes, sir.

XQ228. And that is what that time is for? A. Yes, sir.

XQ229. Now, I hand you your check roll for June, 1901, marked (Taylor) Exhibit "14," and that is your original report for all the labor done by you and your men for that month?

(Hands witness Exhibit and requests that it be marked (Taylor) Exhibit No. "14.")

A. Yes, sir; that's the roll.

XQ230. Accompanying that paper I find the weekly report of material used and labor performed for the week ending June 30th, 1901 (which is marked (Taylor) Exhibit No. "15"). Please look at that and tell me whether that is the original which you turned in?

(Hands witness Exhibit and request that it be marked (Taylor's) Exhibit No. "15.")

A. Yes, sir; that is the weekly report.

XQ231. And what notation in writing did you make upon that report?

A. Well, there's 2 days repairing track, Donk Bros.; and 2 days repairing track, Logwood & DeCamp; and 3 days general track repairs.

XQ232. Now, Donk Bros., that you refer to there, that's the Donk Bros. Coal Company, isn't it? A. Yes, sir.

XQ233. An industrial track at Vandeventer avenue, isn't it?

A. Yes, sir.

XQ234. And what was the Logwood-DeCamp track that's referred to there?

A. Well, that's an industrial track.

647 XQ235. Where is that located?

A. Right alongside of Donk Bros.

XQ236. Now, I hand you a letter of June 8th, 1901, from you to Mr. Nietmann, as Exhibit (Taylor) "16." That is the original letter which you wrote Mr. Nietmann, wasn't it?

A. Yes, sir.

(Hands witness letter and asks that it be marked (Taylor's) Exhibit No. "16.")

XQ237. That was in reference to the Donk Bros, work, was it? A. Yes, sir.

XQ238. And Exhibit "17" is a letter from Mr. Nietmann to Mr. Haynes, the General Roadmaster, signed by Mr. Nietmann, sending a statement of the material used and cost of

labor in repairing this Donk Bros. switch; that is in the hand-writing of Mr. Nietmann, isnt it?

(Hands witness letter and asks that it be marked (Taylor's) Exhibit No. "17.")

A. Yes, sir! that's Mr. Nietmann's hand-writing.

XQ239. That refers to the same matter that's in your weekly report and in that letter of yours to Mr. Nietmann?

A. Yes, sir.

XQ240. And now that your memory is refreshed by the examination of these documents, isn't it true that the way you did about these industrial tracks when you reported was to endorse any statement that you made upon your general weekly report of all labor and material used? A. No, sir.

XQ241. You think that, in addition to that, at times you made special separate reports?

A. Only separate pay-roll.

XQ242. Now, in these statements the report is simply
648 endorsed upon the weekly statement? A. Yes, sir.

XQ243. Now, do you think that at other times you did it in other ways? A. No, sir.

XQ244. You think that that's the way it was done?

A. Yes, sir.

XQ245. So that, when you speak of reporting as to those industrial tracks, that is the way you made the reports?

A. Yes, sir; that's the way we done it.

XQ246. I want to offer these exhibits in cross-examination.

Re-direct Examination

By Mr. Travous:

RDQ1. Do I understand that in addition to these different reports and endorsements you included the labor cost that was to be cut out from the Colorado bill or main track work in that check roll No. 2? A. Yes, sir.

RDQ2. I understood you to say that you made a separate roll which included everything off the main track?

A. Yes, sir; outside of the west of Forsythe Junction.

RDQ3. Yes; and outside of what—that is, outside of what you call Company Tracks? A. Yes, sir; yes.

RDQ4. By Company tracks you mean the main tracks?

A. We mean the main tracks.

RDQ5. Cross-overs and passing tracks?

A. From Forsythe Junction to Eighteenth street.

RDQ6. And by private tracks you mean tracks leading to industries? A. Yes, sir.

RDQ7. And all that latter was cut out by another re-
649 port from the general report?

A. Roll; another extra roll.

RDQ8. By another check roll? A. Yes.

RDQ9. Well, is that check roll that has been offered here and marked No. "2"—is that the form of check roll that was used to cut out this work— and material, etc., that only included labor, I believe? A. Labor; that's all.

RDQ10. To cut out work done off the main line?

A. Yes, sir; and west of Forsythe Junction. We didn't carry any material used upon the Company's tracks at all.

Re-cross Examination

By Mr. Hagerman:

RXQ1. When, in any check roll in the form of your Exhibit No. "2," there was included any of the labor that was done off the main track east of Forsythe Junction, would you make some indication of the fact on the report?

A. No, sir; but it was east of Forsythe Junction to Eighteenth street.

RXQ2. Now, in form No. "2," your Exhibit No. "2," it is headed "Work West of Forsythe Junction"? A. Yes, sir.

RXQ3. That meant the amount of labor during that month that was done, in the general pay-roll, that was done west of that point? A. Yes, sir.

RXQ4. Now, if the work had been done east of Forsythe Junction, how would you note it in that form No. "2"?

A. I would not have shown it at all. I would just carry it on the same roll it was, of work that was off the main line from here to Forsythe Junction.

RXQ5. Oh, that is, you would not have made any mark,
650 east or west?

A. No; our reports work from Forsythe Junction to Eighteenth street.

RXQ6. Now, in No. "2" for that particular month, as I understand you, it happened that there wasn't any labor done east of Forsythe Junction except on the main track?

A. Yes, sir.

RXQ7. And, therefore, in that report you indicated that the work was done west of Forsythe Junction? A. Yes, sir.

RXQ8. Now, when you put in one of those forms and it did include work east of Forsythe Junction, but not on the main tracks, how would you show it in your report?

A. I would show it just the same as that, as west of Forsythe Junction.

RXQ9. Although the work was done east of Forsythe Junction? A. It didn't hurt where we done it.

RXQ10. Well, if that is a fact—

A. If we done two days' work off the main line at Eighteenth street, we would mark it west of Forsythe Junction, work to be charged against anybody else.

By consent of the counsel it is agreed that the signature of Mr. Taylor to this deposition will be waived.

By consent of the Counsel the taking of these depositions is adjourned until 1:30 p. m., same day.

Pursuant to adjournment, parties met at same place at 1:30 p. m., February 27th, 1905; present, counsel as before, and the following proceedings were had:

Edward B. Pryor, of lawful age, being produced, cautioned and sworn to testify the whole truth, and carefully examined, deposes and says as follows:

651 Direct Examination

By Mr. Travous:

Q1. State your name? A. Edward B. Pryor.

Q2. What position do you hold with the Wabash Railroad Company at present? A. Assistant to the President.

Q3. What position did you hold beginning December 31st, 1886, and extending to, say, July, 1902?

A. I was Assistant Auditor most of the time; in fact, ever since April 1st, 1887; prior to that time, from December to April, I was Chief Clerk of General Accounts.

Q4. State whether your duties made you familiar with the matter of accounts between the Wabash Railroad Company and the Colorado Company upon what is known as the joint section extending from Eighteenth street to the north line of Forest Park?

A. Yes, sir; I have been familiar with the accounts and all matters in connection with them from the time the St. Louis, Kansas City & Colorado Road commenced to use the property.

Q5. What were the instructions and what plan was pursued in respect to charges for labor and material during that period in the construction of tracks leading to industries along the joint section?

A. That all expenditures in connection with the construction and maintenance of such switches were to be kept entirely separate and not to be taken into the bills against the St. Louis, Kansas City & Colorado Road.

Q6. During that period, so far as you know, by whom were all those bills paid? That is, bills for labor and material?

652 A. Directly by the Wabash Railroad Company, and its predecessors, the Wabash Western Railroad Company, and the Wabash, St. Louis & Pacific Railway Company.

Q7. Was any part of it, under the instructions in your office, to be charged to the Colorado or any other company?

A. No, sir.

Q8. If any charge was made against the Colorado for any labor on account of any material used in the construction of

any industrial track during the period you have mentioned, explain or state, if you can, how it came to be made?

A. If there were any such items, they got into the account by mistake, by oversight or misunderstanding of the clerks who made up the bills.

Q9. What was considered in the preparation of bills in which the Colorado was to participate as constituting the joint section under the decree in this case of December 31st, 1886? That is, what was the understanding of your office?

By Mr. Hagerman: I object to that as incompetent and calling for a mere conclusion.

A. The main tracks, cross-overs and turn-outs between Eighteenth street and the north line of Forest Park.

Q10. By turn-outs you mean passing tracks?

A. Passing tracks; yes, sir.

Q11. You might state briefly: What matters were charged to the Colorado Company during that period, and also including the period during which the Wabash Company did the switching, making up and breaking of trains for the Colorado, etc.?

A. From the time the St. Louis, Kansas City & Colorado Road commenced to use the property, bills were made for the fixed rental as provided for by the decree, and also for
653 a proportion of the cost of maintenance and operation of the main tracks and cross-overs and passing tracks, as provided for by the decree, and up to the seventh of May, I think it was, 1902, the Wabash Railroad Company performed a service for the St. Louis, Kansas City & Colorado Road, and for the receiver of that road, in the way of making up and breaking up their trains in the Ewing avenue yard, and for the switching of all the cars to and from the industries and sidings, which we have always claimed was done outside of the decree.

Q12. Under a separate agreement

A. Under a separate agreement, yes; and also at the close of each year made a bill for a proportion of the taxes as provided for under the decree.

Q13. For this switching service that you speak of and the use of the Ewing avenue yards in connection with it, what did the Colorado Company pay?

A. The pro rata proportion which the number of their cars bore to the total number of cars handled, or, in other words, what is usually called the wheelage basis.

Q14. Well, what did it pay on that proportion?

A. It paid a proportion of all the expenses.

Q15. Yes; all of the expenses of what?

A. Operation and maintenance—yes, we made separate bills for the proportion of the expense of switching and making up

and breaking up trains and a separate bill from that for the maintenance expenses provided for by the decree, and included in the maintenance bill the repairs to the Ewing avenue yard tracks.

Q16. And did they pay—in what they paid was there included also the same proportion of the cost of main-
654 tenance of the Ewing avenue tracks?

A. Yes, sir; that was all included.

Q17. Other than the proportion of the maintenance?

A. Other than the proportion of the maintenance and operation.

Q18. During all this time, Mr. Pryor, who received the revenue derived from these industrial tracks?

A. The Wabash Railroad Company, and its predecessors.

Q19. And you can state whether it retained them?

A. Yes, sir.

Cross Examination

By Mr. Hagerman:

XQ1. You state, Mr. Pryor, that generally the instructions given and plan pursued as to the charges for labor and material in those industrial tracks, they were to be kept separate and not put in bills; now, was there any kind of a written instrument that is in existence?

A. No; I don't know as there was; it's always been my general understanding of the accounting.

XQ2. What particular people connected with the Wabash Railroad Company kept those accounts and made them up?

A. They were made up in the office of the Superintendent at Moberly.

XQ3. And what particular office would be the one that had the charge of making them up? A. The Superintendent's.

XQ4. So that, when you speak of instructions and plans, you are just simply giving your general understanding of the situation? A. Yes, sir.

XQ5. And there is no written order or instructions by
655 writing that you can turn to in reference to it?

A. Not that I can turn to.

XQ6. Now, during the course of years there were bills of different character rendered; one was for what is called the fixed rental under the decree?

A. That was a monthly bill.

XQ7. That was a monthly bill and was on a separate form of its own? A. Yes.

XQ8. Then the taxes were rendered in the form of a separate bill on the basis fixed in the decree, presumably because you only paid your taxes once a year?

A. Once a year.

XQ9. Whenever you paid them, you rendered your bill accordingly? A. Yes, sir.

XQ10. Now, then, the third class of bills was what you call the "maintenance" bills? A. Yes, sir.

XQ11. And there was still a fourth class?

A. Which we called the "operation," or the switching.

XQ12. That was the mere service bills?

A. Bill for services rendered in the switching.

XQ13. Now, in the service bills which are mentioned in paragraph 15 of the First Agreed Statement of Facts, that didn't include anything except the service charges for the switching; the question of maintenance or repairs didn't enter into that account at all? A. No, sir; not at all.

XQ14. But all the charges of whatever form, or whatever they may have included, or whether it was a mistake or otherwise, went into this class that we have been speaking of as maintenance and repairs? A. Yes, sir.

XQ15. And what you mean to say is that, if included in those maintenance bills, there were any charges upon
656 these industrial tracks, it was a mistake according to your understanding?

A. Yes, sir; according to my understanding.

XQ16. Now, there is nothing in any paper or writing among the Wabash Railroad records that indicated that the maintenance bills could be limited to maintenance of main and cross-over tracks; no writing that we could see that would give any such indication?

A. No, sir; but my familiarity with this matter was largely gained through the intervention of the Wabash Railroad Company in the receivership of the St. Louis, Kansas City & Colorado Road.

XQ17. At that time you had occasion to look into it?

A. To go into all the book accounts which were not paid.

XQ18. Because you had quite a controversy in the court?

A. Lasting for two or three years, and from that I became very much more familiar with the matter than I had ever been before.

XQ19. Well, when you say then, that in the preparation of the bills for the Colorado Company, the joint expenses chargeable or attempted to be charged were understood to be the main track, cross-overs and passing tracks, that is pursuant to your general understanding of the situation? A. Yes, sir.

XQ20. There is no bill or paper that you could point out which would indicate any such thing? A. No, sir.

XQ21. Now, something was said about the maintenance bill in reference to the Ewing avenue yards; just—I didn't quite understand what you meant by that?

A. I meant by that that it was my understanding that the

maintenance bill did include all the repairs and the ex-
657 penses in connection with the maintenance of the Ewing avenue yard.

XQ22. That is, in addition to the main tracks, cross-overs and passing tracks—the Ewing avenue, you understood?

A. Yes, sir.

XQ23. Were included?

A. As long as it was used—as long as we handled the St. Louis, Kansas City & Colorado trains in that yard.

XQ24. And that was included in the regular maintenance bill, which was only one bill and in one form? A. Yes, sir.

XQ25. And about how many tracks were there in the Ewing avenue yard?

A. I think there were eight or nine tracks there.

XQ26. And about what were the dimensions of that yard in length and width?

A. I would say it was probably about—well, I could hardly give an accurate description of the yard; you can get that better from the Engineer's office; I imagine it was somewhere about three squares, the length of three city squares, and comprised about eight tracks.

XQ27. About what width would that make it—a block in width?

A. Oh, no; not to exceed 100 feet, probably.

XQ28. And what is it, now, that you call the cross-overs in this? A. From one main track to another?

XQ29. That is the connection between the two?

A. Where they would have to cross from one main track to another.

XQ30. And how many main tracks were there between Eighteenth street and Ewing avenue? A. Two tracks.

658 XQ31. And the cross-overs that you speak of were the tracks that would connect those tracks at the different points? A. Yes, sir.

XQ32. Now, the passing tracks are what?

A. I don't know how many passing tracks there are; there are passing tracks at different points between Eighteenth street and Vandeventer avenue.

XQ33. You don't know how many?

A. No, sir.

XQ34. And what would they indicate there? Just a description of them in a general way; something in addition to the main track?

A. Just a passing track, where freight trains would probably be handled when there were through passenger trains coming or going on the main tracks.

XQ35. That is, a sort of a siding to let one train out?

A. Yes; to get clear of the main track.

XQ36. Now, you say that revenues from industrial tracks were received by the Wabash Railroad Company?

A. Yes, sir.

XQ37. During that period that the Wabash did this switching service, now, what did you mean by that?

A. I meant that there were a number of cars that were switched for revenue upon which the Wabash road didn't have a road haul; for instance, received from the Missouri Pacific or the Terminal Association; a car that would have to be switched upon one of these industrial tracks and a fixed switching charge collected for the service.

XQ38. That is to say, that wherever a car that was not a car of the Wabash or Colorado that was to be switched into one of these industries, until the controversy arose, the Wabash would do that switching and collect the revenue there-
659 from? A. Yes, sir; and retain it.

XQ39. And for the services in switching the Colorado cars to and from these industries the charge was made in accordance with the facts as we have stipulated them here in proportion to the number of cars? A. That's right.

XQ40. This was charged to and paid by the Colorado Company as the number of those cars handled between such points by the switch engines of the Wabash Company or its predecessors in title, bore to the whole number of cars of both roads handled by switch engines?

A. Yes, sir; counting the cars which were switched for revenue as Wabash cars.

XQ41. Well, what I wanted to get at was what you meant by receiving them as revenue, that is, the Colorado Company, during that time had no switch engines of its own and did no switching at all? A. No, sir, no.

Re-direct Examination

By Mr. Travous:

RDQ1. Had the Colorado Company any use of the Ewing avenue yards itself, or was the use limited to our handling its cars or trains in those yards with our engines?

A. Entirely the latter; the practice was that the Colorado train would come in on the main track and that the engine would be cut off and sent to the roundhouse and the Wabash switching engines would then take hold of the train and break it up, switch out the cars and switch them into the Ewing avenue yard, or to wherever the car was destined, the Wabash doing all of that work.

660 RDQ2. And it was only in connection with that work that use was made of our Ewing avenue yards by its cars?

A. Yes, sir.

Re-cross Examination

By Mr. Hagerman:

RXQ1. Now, in these revenues that were received in switching for other companies, of course, the Colorado Company was given credit for the receipts? A. No, sir.

RXQ2. That is, you treated those cars when you did the switching service for another company just exactly the same as the Wabash car; in the ascertaining of the proportion that would be treated as a Wabash car just the same as if it had been a car of the Wabash Railroad Company? A. Yes, sir.

By consent of the counsel the signature of Mr. Pryor is waived.

Henry L. Magee, of lawful age, being produced, cautioned, and sworn to testify the whole truth, and carefully examined, deposes and says as follows:

Direct Examination

By Mr. Travous:

Q1. State your name? A. Henry L. Magee.

Q2. What is your present position with the Wabash?

A. General Superintendent.

Q3. How long have you held that position?

A. To the best of my belief, without looking into the books, I think about seventeen years.

Q4. Prior to that time, what was your position with the Company or its predecessor companies?

A. Division Superintendent of all the lines west of the Mississippi river.

661 Q5. Then, since December 31st, 1886, you, first as Division Superintendent and later as General Superintendent, have had general charge of the lines of railroad in Missouri, including section 1 and that part of section 2 extending between Eighteenth street in St. Louis, to the north line of Forest Park? A. Yes, sir.

Q6. State whether during all of that time you have been personally familiar with this part of the line known as the joint section? A. Yes, sir.

Q7. What kind of switch-stands have been used on the joint section; that is, upon the main tracks, passing tracks and cross-overs during this period?

A. Both have been used, what is termed the low switch-stand and the high switch-stand. You wish me to give the reasons?

Q8. Yes; and localize, if you can?

A. Owing to the location of those tracks, the main tracks, first, being bounded on each side by other tracks, on the south side by the Missouri Pacific and from Eighteenth to Twenty-third street by the Terminal main track, and from Twenty-

third street out to yard limits on the north bounded by Wabash side tracks, paralleling the main tracks, and at those points where there were cross-overs between Eighteenth and the yard limits, where there was sufficient room between main tracks or between the main and side tracks, the high switch-stands were used, as they were more preferable for the engine men, they could use them better than the low one, but where we were limited for space between the main tracks a low switch-stand was put up so as to give the proper clearance to men hanging on the side of a car in switching or doing their work; the low switch-stand places, a man hanging on the side
662 of a freight car below his body, while if a high switch-stand had been used the employes would be continually in danger. This is merely the reason why the low switch-stands were used, in quite a number of places, not that they were preferable over a high switch-stand. Beyond the yard limits to Union avenue the switch-stands, so far as I have noticed, were all high switch-stands, what we term not the highest semaphore type, but a switch-stand about six and one-half feet in height from the rail up.

Q9. Do you know what number frogs were used in the cross-overs and passing tracks on those sections?

A. The frogs in the main track, to the best of my knowledge, were all an angle of one in 9, and those off from the passing tracks on to other tracks one in 7, mostly known as No. 9 and No. 7.

Q10. What do you recollect, Mr. Magee, concerning a separate agreement made with Mr. Emerson on behalf of the Colorado Company some time in 1887, I think it was, under which the Wabash did switching, breaking up and making up of trains, etc., for that company, including delivery of cars for it to and from industries, and in which we, the Wabash Company, used its Ewing avenue yards in connection with that work?

A. I don't believe I could just give you an interview, word for word as we had, but I remember distinctly after that decree, permitting the Colorado to come in and use our property jointly, a few days afterwards, no arrangement had been made as to doing the Colorado switching or work, and just how it came about, of a meeting between a Mr. Emerson, whose title at that time was Superintendent and
663 Chief Engineer of the Colorado, and Mr. Charles M. Hays, General Manager of the Wabash, and myself, we had a meeting here in St. Louis as to how each company would do its switching here in St. Louis. I remember distinctly we all three agreed that it was not practicable to do switching or terminal work on the joint section. To the best of my knowledge, now, Mr. Emerson remarked that he had no switching power at that time and asked us if we wouldn't do their switch-

ing, and at that time remarked that there would be very little of it, and we agreed with him that we could, if it was necessary, we could put on more power, but we would do the switching for them; then the question came up, on what basis. Now, as to just the detail talk: We discussed it probably for a half-hour or an hour, but it was finally thought best to put the whole yard in and divide all the operating expenses, maintenance and so on, on a wheelage basis, what is commonly termed the "wheelage basis," and it was my recollection in some way, either Mr. Hayes wrote me confirming to do the work for the Colorado and named the basis, or whether it was a letter from Emerson to Mr. Hays confirming it on their part—I remember, I know, for years afterwards, and in giving my instructions to the subordinates, to the Road Department in keeping the expenses of the yard, etc., it was through some correspondence, but just exactly the different letters and the wording of them, I could not now explain just how it was conducted, but I know we had another meeting afterwards with Mr. Emerson in reference to the use of the track between Union avenue and Forsythe Junction, that didn't come up at the first meeting—the first meeting was a few days after the decree giving them the

664 right to use our property.

Q11. Then you may state if the Wabash Company did, after that conference you have mentioned, undertake and perform switching service for the Colorado upon this arrangement in regard to dividing the cost of operation and maintenance upon a wheelage basis, and also state how long that continued?

A. That continued from that time up to about a year and a half ago, or two years ago; I haven't any data here as to that.

Q12. You may state whether it was, during this period, practicable to break up trains or make up trains upon this joint section proper, or whether any work of that kind could be done, on this original 30-foot right of way, the main tracks and passing tracks? A. I would say, no.

Q13. Has the Wabash Company, during the period spoken of, used the joint section, that is, the main, passing tracks, cross-overs, on this 30-foot right of way for making up trains or breaking up trains or switching purposes generally?

A. No, sir.

Q14. Well, state why it has not been practicable to do it?

A. It would only be practicable to a certain extent to try and switch and drill and make up trains on two tracks on a 30 foot strip; all you could get in is two tracks; you would only have the one track upon which your string of cars would be that you would drill from, and you would only have one track to drill on to, which would make it a very slow

process of drilling, with the understanding that while you are drilling there no schedule or regular trains, or engines with cut of cars could use that 30-foot strip while any such
665 drilling was being done. It would, in other words, block the line; that is the reason why it never was used for drilling or for switching; that part was kept clear for the movement of regular trains.

Q15. How many years' experience have you had in the operation of trains on similar properties?

A. I commenced railroading in the operation and maintenance departments 42 years ago, and some six or eight years afterwards I went into the operation of train service, 35 years ago.

Q16. State whether the difficulties you have mentioned would be increased if such work upon the joint section were attempted to be done by two separate companies, and if so, how, and to what extent?

A. I have never seen it done, but I can only assume what the result would be; it would result fatally to both companies; make it very expensive and while one company would be using the two tracks for swtiching, the other company would have to stand still and wait until the other party got through.

Q. Where is the Colorado Company's yards now with reference to this joint section?

A. They are—the only yard I ever knew them to have was immediately west, when I say west—beyond Forsythe Junction—of course—the last few years, as I have understood and seen papers that the Rock Island bought a strip of land immediately north of our tracks between Union avenue and Forsythe Junction, and on which a lot of tracks were placed, and I think said tracks were operated by the Colorado engines; but they are all west of Union avenue. I say west—we call our line from here to Kansas City west—it's probably north of Union avenue.

666 Q. State fully what you know with respect to the capacity of this joint section during the period mentioned, for the making up of trains, and to what extent it was needed or necessary for the running of trains alone?

A. I can only state while this is in—the joint section is located, while it is double track—used for main tracks—it is the busiest part of any track we have between here and Kansas City or any of the lines west, for the reason that while all our through trains pass over it, we also have many suburban trains, short trains, and short passenger trains, also short freight train running out here only to Ferguson, and all the through freight trains passing over the biggest part of the joint section, makes that the busiest piece of track we have on any of the lines we have west of the Mississippi river.

Q. Well, speaking of the 30-foot right of way, how many tracks are there on that? A. Just two.

Q. Is it practicable to put more than two on that right of way? A. No, sir.

Q. The other tracks that you mentioned are outside of them?

A. Yes, sir.

Q. Some of them on property acquired subsequently?

A. Yes, sir; and some crossing corners of lots that the Company had owned for many years.

Cross Examination

By Mr. Hagerman:

XQ1. How many tracks have you between Eighteenth street and Union avenue, regardless now of the 30-foot strip of which you speak, how many tracks?

A. We have between, commencing say with Twenty-third street and going out to Compton avenue, there is places, I think, we have seven or eight tracks, different lengths.

667 We haven't any between Eighteenth and Twenty-third streets for the reason we never had any property except the 30-foot strip.

XQ2. So you only have two tracks in that space?

A. That's all; and commencing with Twenty-third street we have for quite a distance two additional tracks, then three and four, as the property spreads out, and I think we must have seven or eight tracks where the property is the widest, near Ewing avenue, and then, as we proceed west to Compton avenue, it tapers back wedge-shaped and gets back to one or two tracks.

XQ3. Now, did I understand from that that you started from Union avenue or from Eighteenth street, and how is it between Twenty-third and Compton avenue?

A. I said these tracks mentioned there are between Twenty-third street and Compton avenue, which is possibly not quite half way out to Union avenue. Between Compton and Union at places there was room for one additional track on each side of the 30-foot strip, and in some places there was not room to put in more tracks besides the two main tracks on account of their being either on a high fill or in a deep cut which occupied the entire width of the right of way.

XQ4. The greater portion of the way you have more than two tracks?

A. Yes, well—no, I would not say as to that; I think the greater portion—oh, yes, more than two tracks; yes; that's correct.

XQ5. Now, what are these additional tracks other than the two main tracks used for?

A. For making up trains, for the taking care of and distributing the cars as they would come in, deliver them

668 to the other roads, same way in receiving a string of cars from across the river, across the Terminal bridges, which are pushed into this yard and then they are switched, and some go out on the road and others put in on to industrial tracks for unloading.

XQ6. How many tracks have you of the character that have been called passing tracks?

A. On the territory between Union avenue and Twenty-third street, I would not call any of them passing tracks.

XQ7. Well, the reason I used the word, Mr. Magee, passing track, some of the witnesses, in speaking of the accounts, called them that, and I suppose that is the technical name, which is what Mr. Pryor described as being the track where a freight train, for instance, would stand while a passenger train went through?

A. A good many years ago here we used one track next to the main tracks as the passing track paralleling the main track.

XQ8. And since then what would you use as the passing track?

A. Well, that has been abandoned, it all being in the territory as termed "Yards," and the double-track having been completed the entire distance for main tracks, the incoming trains all using one track and all the outgoing using the other main track; it has not been once only in a great while that a passing track is necessary for one train, for a fast train to pass a slow train, so the word "passing track" has been eliminated.

XQ9. How long since you have had those two tracks so as to minimize the necessity of using a passing track?

A. About one year.

XQ10. Well, now, before that, where was the passing track?

669 A. The one track immediately west of Twenty-third street and running clear out to very near Vandeventer avenue, with one or two cross-overs from the main track, so that two or three trains could get—one outgoing train be ready on one of the passing tracks, while an incoming train would pass by that and pull on a cross-over and take another part of this passing track.

XQ11. Well, now, where was there any other passing track on the section?

A. There was between Kingshighway and Union avenue, what is termed through Forest Park.

XQ12. Are those tracks still in existence?

A. Through Forest Park that portion is now used as one of the main tracks.

XQ13. But elsewhere?

A. Elsewhere down through the Ewing avenue yard part of that went in as the double main track and other parts of it for this switching lead.

XQ14. Well, how about the part running out to Vandeventer avenue, a long strip of that track up there where you had numerous cross-overs?

A. The biggest part of that is for this double main track.

XQ15. And a portion of it—?

A. And a portion of it went in this third track which the switching crews only use in going out to industries.

XQ16. Now, are those passing tracks which you had, are they on the 30-foot strip?

A. Possibly, part of the west—some of them were.

XQ17. Most of the way they were not, were they?

A. Most of the way they were not—since two main tracks have been put in—but were before. The second main track was put in last spring, I think.

XQ18. And these cross-overs were not entirely upon
670 the 30-foot strip then?

A. No, sir; not entirely.

XQ19. Some places they would be and some places they would not? A. Yes, sir.

XQ20. Now, then, what kind of switch-stands are in use now upon the road between Union avenue and Eighteenth street on the main line?

A. Wherever we have space and distance to put them up the high switch-stands are used, but I don't know as I should answer that, you asked me what is used to-day. I would have to go and examine it first.

XQ21. I was trying to get whether you had made any change at any particular time or whether it is to-day practically as it has been?

A. Practically as it has been, owing to the condition of the ground and the space you had for placing such switch-stands.

XQ22. Now, how many in that territory on the main track, low stands altogether?

A. I couldn't say; I would have to make an examination. Wherever the space would be so narrow that a high one could be used with safety, a low one is erected.

XQ23. Well, that is in very rare instances, isn't it, on the main line?

A. Not in paralleling a yard, and especially this territory between Eighteenth street and out to Grand avenue, where the Missouri Pacific is right on one side and the Terminal and Wabash yard on the other; in other words, they left no space for high switch-stands or anything else, but occupied all the ground with tracks just so as to give proper clearance for the cars and engines to pass.

XQ24. And in that space you have got to use the low stands?

A. We have not got to, but we do for the safety of the men.

671 XQ25. Well, you did use it, and in that respect the tracks are to-day practically as they have been for a number of years?

A. Well, I think there is a little difference since the second main track was put in.

XQ26. And some additional low stands put in then?

A. There was more years ago than there is at the present date.

XQ27. More low stands? A. Yes, sir.

XQ28. But you cannot give us any definite idea how many there were?

A. No; I would judge the way this yard was fifteen years ago that there would be anywheres from eight to ten or fifteen at that time, but those conditions have changed by putting in the two main tracks, or as I stated before, the second main track was put in; nearly all the switches lead off from the main track, from one main track, they lead off from that; while in putting in this double main track there were very few switches left between Eighteenth street and Union avenue, except a few cross-overs, what was termed the yard switches, have all been cut out of the main tracks.

XQ29. Is there any way that we could find out just when those low switches were put in and where, from any kind of a record that you keep?

A. I don't know; that would be for the maintenance men. I don't even know as we still have any men that at that time kept the record, that is, taking back fifteen years ago.

XQ30. Well, now, what was it you said about the character of frogs used? You described them as No. 9's, I believe, or No. 7, or at least that is the way some of the witnesses

672 described them, and we had better call them that way; where are the No. 9 frogs used?

A. Those placed in the main tracks?

XQ31. Are all 9's? A. Are all 9's.

XQ32. Just tell me what a frog is in railroad parlance?

A. What a frog is?

XQ33. Yes.

A. It is where the side track rails cross the main track rails, where it leads up into—or where one track leads up into another, and has to cross the first rail in order to get onto the other track.

XQ34. Are those frogs put in at the—what they call the point of the switch?

A. No; it is at the intersection of two rails where they cross.

XQ35. What you call the heel?

A. Well, there is a heel to the frog, which is the—heel of the frog is the part the farthest away from the switch.

XQ36. Well, now is that the place where the frog goes in, or does it also go in at the point of the switch?

A. No; the point of the switch, plainly locating it, is from 65 to 85 feet away from the frog; the switch is the place termed where you first leave a track, the switch, or as some term it, switch points, now, it is where the rail comes right to a point, and the wheels taking that point, that leads it off then—

XQ37. To a distance of how far? A. 100 feet.

XQ38. That is where the frogs are put in?

A. That is where the frog then is placed where the two rails join and weld to the main track, the other side crosses the main track rail.

XQ39. Now, where are the No. 7 used?

A. In a similar place as the main track on switches.

XQ40. That is, after you get off from the switch on the main track, we will call it a side track, then when it is
673 switched off from that, you used the No. 7?

A. Yes; used the No. 7.

XQ41. Now, is there another different number that is used?

A. In using a three-throw switch, of which there are very few used now, there is a 5½ No. used.

XQ42. And where did your company use those?

A. I am of the impression we had two or three in the yard a good many years ago where there was—the space was limited and a switch termed three-throw switch was used; in such a case you can use two No. 7's or two No. 9's or you can use one No. 7, one No. 9 and a No. 5 or 5½.

XQ43. And you think some of those were used?

A. I am right sure we had one or two.

XQ44. Those were not used on this 30-foot right of way, but off in the yards—the 5½?

A. No, I don't think any of them were, well—hold on, I believe one was used right near Union avenue.

XQ45. On the main tracks? A. Yes, sir.

XQ46. Only one that you recall?

A. Only one that I can recall.

XQ47. Were there any other numbers besides the 9's and 7's and the 5½'s that were in use?

A. That's the frog in general use. In special cases we have used as high as No. 20; I don't think there are any special cases on this territory.

XQ48. You don't distinctly recall the interview that you and Mr. Hays and Mr. Emerson had or any distinct conversation that you had at that time?

A. Except a few words, I remember, after the decree, Mr. Hays called me in his office and in a smiling way asked me: "How are you going to operate to Ewing avenue with the
674 Colorado doing their own switching mixed in with our work?" And my reply was that—

XQ49. Was Emerson there then? I don't care about your and Mr. Hays' conversation only when Mr. Emerson was present? A. No, only just what I testified to.

XQ50. And Emerson stated that he didn't have power to do any switching?

A. At that time, and was sort of anxious to make a temporary arrangement until we could see how the thing would work out.

XQ51. Well, was that conversation at the time or a short time after the original decree or after the affirmance of the case upon appeal, do you remember that?

A. Well, as to that, I couldn't testify to, but it was about the time when they were ready to move engines and cars from the Forsythe Junction; their line at that time when this came up was not completed between Forsythe Junction and Union avenue.

XQ52. Well, you made some written contract about using your road between Forsythe Junction and Union Avenue?

A. Well, that came up a year afterwards, after their road was completed and they were going to operate it down to Union avenue, and cross us at Forsythe Junction, then the question came up if it would not be better to let them continue using our main track and we all agreed upon it.

XQ53. That is, using your main track between Forsythe Junction and Union avenue, instead of using a track of their own that would cross you at Forsythe Junction? A. Yes, sir.

XQ54. And you made a separate written contract about that? A. Yes, sir.

XQ55. But that was some time afterwards?

675 A. I think possibly a year after when they first commenced moving engines and cars out from Forsythe Junction.

XQ56. You said there was some kind of writing or correspondence in reference to the matter; have you got any writing or letter or anything at all in writing in reference to the matter?

A. Everything I had was all destroyed by the fire at the time the building burned on this same location here. I lost everything I had in my office.

XQ57. Well, do you remember definitely about the correspondence, between whom it was, or whether there was a writing of any kind?

A. The correspondence was, as I remember, between Mr. Hays and Mr. Emerson, confirming the verbal talk they had had, and in other words, the correspondence showed that each expected that the Wabash would do this switching and the basis, which was plainly on a wheelage basis, which included at that time the roundhouse, the use of the Wabash roundhouse, turntable and everything of that kind, and Mr. Hays gave me a copy of that letter, or wrote me similarly to that, as I was the operating Superintendent.

XQ58. Well, your idea then about the correspondence that you had was some communication from Mr. Hays to you?

A. Yes, sir; and also the conference; I was present with Mr. Emerson.

XQ59. But what I am asking you is particularly about the writing; whether this arrangement between you and Mr. Emerson was a verbal one, or whether there was a communication in writing between you and Mr. Emerson?

A. I don't believe there was any.

XQ60. Now, what was said as to the basis of doing the
676 work; first, I will ask you the work, as I understand, was that you were to do the switch service for them, including the making up of their trains for which they had no facilities?

A. And take care of their engines; the basis was to take the total expense—

XQ61. And divide it how?

A. And divide it on the number of cars for each company, that was the basis; the engines, of course, were on a little different basis; that was on the basis, that didn't go in that account, but they came on the number of engines handled for each company.

XQ62. That is to say: In this arrangement about this service charge it was to be divided in proportion to the number of cars switched and in proportion to the number of engines used?

A. Yes, sir.

XQ63. Now, do you remember anything distinctly being said upon the subject of maintenance and why—I ask you—that in the bills nothing seems to have been said about it? That is, the bills seem to have been rendered simply for a service charge divided upon the basis upon which you speak?

A. My recollection was that all that came in with—came in that same general arrangement; it was not alone for the service performed, but for everything that was used; if there was a shingle went off the roundhouse they bore their proportion of putting a new shingle on back for as long as they used that roundhouse, and the tracks; the track men, they were all at that time instructed, it was considered—all those tracks were joint between the Colorado and the Wabash, and any and all

expenses for supplies, materials, and for labor and for switching and the use of the switch engines, oil and every-
677 thing was divided on the wheelage basis, the repairs to the switch engines, everything—

XQ64. Now, you were aware, weren't you, that in the system of keeping the accounts, the account for this service charge was upon the basis that we are speaking of, in proportion to the number of cars switched, or the number of engines moved, whereas the charge of maintenance under the decree, the bills rendered for maintenance were on the basis of wheelage upon the main track, there was that difference in the way of keeping your accounts; do you know why that was kept up, or was your attention called to that?

A. No, I don't think my attention was called to that.

XQ65. That is, you are not familiar with the way in which those accounts were kept? A. No, sir.

XQ66. Well, who would be the man who was at that time familiar with that?

A. Well, I don't know of anyone right now—any man that would be more familiar than Mr. Pryor.

XQ67. And do you know of any writing that would give any enlightment as to the question—as to the keeping of accounts, or would show whether there was any kind of maintenance that went into the account that was charged here, what we call the service charge—I assume from the Statement of Facts, and from what Mr. Pryor said it came to be done, and whenever they rendered the service charge or when not including the maintenance charge. Now, what I want to know is whether you know anything about it, from any writing or paper that would enlighten us as to that? A. No, sir.

XQ68. Now, when you and Mr. Emerson and Mr. Hays had this talk, the talk was to make some kind of a tem-
678 porary arrangement, and from that time nothing more was said about it?

A. No, Mr. Emerson a short time after that left the road.

XQ69. And then the service was rendered and the bills rendered as the records show? A. Yes, sir.

XQ70. Now, some question was asked you about the capacity of the joint section; by the use of the words "joint section," what do you mean, just the 30-foot right of way?

A. Yes, sir.

XQ71. In your description of the capacity, etc?

A. Yes, sir.

XQ72. That is, with your business that your company has to do here, you don't think it is practicable to make up or break up trains on the original 30-foot right of way?

A. No, sir; unless you speak of traffic—

XQ73. The method that you are using there now is to have the two tracks busy so that the cars going one way would

use one track and the cars going the other would use the other and it would stop and interfere with the use of that business if it would stop? A. Yes, sir.

XQ74. You don't mean to say that with your tracks as made there, upon what you call the joint section, there was not room or capacity to make up the Colorado Trains, too?

A. Yes, sir; I mean to say that.

XQ75. There is one question I want to ask you; in this talk with Mr. Emerson there—was anything said as to the maintenance of the tracks leading to industries or was the subject mentioned?

A. It was mentioned, in mine, about stating that everything —all the supplies, everything that was done, as to my recollection, there was no distinction made at that time; they
679 brought in, for instance, a carload of wheat or a car of sand, that was about all the business the Colorado had and we placed it on any track that it was shunted to, on team track or on a private track; there was some parties, I think, at that time, private parties out here that got in some particular kind of stone, it came in on the Colorado, and put on those tracks, and, as I remember it, there was no distinction made whatever of the entire tracks, on the joint section.

XQ76. Well, you don't remember anything having been mentioned about industrial tracks?

A. No, sir; not separately, but everybody was instructed if they used a rail, or put in a switch tie or used anything, the oil or side lights, the whole thing was to be kept account and divided as to wheelage on the two roads.

XQ77. But you don't remember as to whether there was any written instruction about that, if there was any? A. No, sir.

By consent of counsel the signature of Mr. Magee is waived.

William M. Tait, of lawful age, being produced, cautioned and sworn to testify the whole truth, and carefully examined, deposes and says as follows:

Direct Examination

By Mr. Travous:

Q1. State your name? A. William M. Tait.

Q2. Did you ever work for the Wabash Railroad Company, Mr. Tait? A. Yes, sir.

Q3. When? A. 1886 to 1904.

Q4. You are not in the employ of the Company now?

A. No, sir.

680 Q5. During the period that you were in the Company's employ, what were your position and duties?

A. Various positions. I went into the Superintendent's office in 1889. Held all the positions in that office; time-keeper, and all the clerical positions, doing voucher work until Janu-

ary, 1904, when I was appointed Chief Clerk to the Superintendent of the Western Division, and was relieved in March, 1904.

Q6. This was all in the office of the Superintendent of the Western Division, was it?

A. Yes, sir; the old Western Division.

Q7. And state whether that division included this track between Eighteenth street and Forsythe Junction? A. It did.

Q8. In the discharge of your duties in that office, did you have to do with the weekly reports, monthly check rolls, statements, vouchers and other papers relating to labor performed and material used in and about the repair, maintenance and improvement work along that joint section?

A. The latter part of that time, the last five or six years up until January, 1904.

Q9. Have you recently gone over and made a careful examination of these various reports, check rolls, etc., including such books as your copy-press books, as related to the matter in that office?

A. I went over the reports in January, and the fore part of February.

Q10. Of this year? A. Yes, sir.

Q11. What did your examination show with respect to the construction of industrial tracks shown upon this statement, entitled: "Statement of Side Tracks built between Eighteenth Street and Union Avenue, showing cost of tracks and how expenses were divided between Wabash and others?"

681 A. The reports, check rolls and other papers that I examined showed the construction of the different side or industrial tracks mentioned on this statement at the dates shown thereon, and that they cost for labor and materials the amount thereon stated, and that the Colorado Company participated in the cost of labor as thereon stated in the cases shown, and that in the other cases it was not charged any proportion of the cost, all as shown by said statement.

Such statement is shown marked (Tait) Exhibit "1."

Q12. You may state whether the statement referred to is accurate? A. It is.

Q13. Well, n this statement is offered in evidence as Exhibit No. "On to the deposition of Mr. Tait.

By consent of counsel taking of deposition is adjourned until 10:00 o'clock, Tuesday morning, February 28th, 1905.

Pursuant to adjournment, met on Tuesday morning at 10:00 o'clock. Present: Counsel as before, and the Direct Examination of Mr. Tait was continued:

By Mr. Travous:

Q14. Mr. Tait did you also, in the investigation of reports and accounts mentioned, prepare a statement showing errors in the computations in the Moberly office in apportioning charges between the Colorado Company and the Wabash?

A. Yes, sir.

Q15. Look at this paper handed you, and which I desire the Notary will mark as Exhibit (Tait) No. "2" to your deposition, and state what that is?

682 (Hands witness Exhibit and asks that it be marked (Tait) No. "2,")

A. It is a statement of credits to which the St. Louis, Kansas City & Colorado Railway is entitled on account of errors in allowing credits for rail taken from track.

Q16. State, if you can, whether those errors are errors of computation or otherwise?

A. Well, they are errors of computation, and I found they ran small amounts through several months, in some instances: there is 600 feet of rail taken out of the track, and the General Roadmaster's office report that amount and report 500 feet of credit, showing just a plain error of 100 feet.

Q17. That is the character of errors represented by that statement? A. Yes, sir.

By Mr. Hagerman: I object to the statement because it is incompetent and irrelevant, and not bearing upon any issues involved here.

Q18. Did you prepare a similar statement showing similar errors against the Wabash Company in making out these accounts? A. Yes, sir; I found some errors.

Q19. Look at this statement, which the Notary will mark Exhibit (Tait) No. "3" to your deposition, and state what that is?

(Hands witness Exhibit and requests that it be marked (Tait) Exhibit No. "3.")

A. Well, this covers excess credits allowed the Colorado Road; that is, an instance where they would take out 150 feet and credit 180, would be over-credited 30 feet.

By Mr. Hagerman: But that is, like the other, a mere
683 error of computation?

A. Yes, sir; just only the other way, working opposite.

By Mr. Travous:

Q20. What was the period of time covered in the examination and two statements of errors above referred to?

A. Well, I could only obtain figures for the years 1890 to 1893; the records for years prior to that were gone, I couldn't locate them.

Q21. Destroyed by fire, were they?

A. Well, they were in an old building across the tracks from the present passenger station at Moberly; that was the record room used by the Roadmaster and General Roadmaster, and was burned and the records destroyed.

Q22. Well, the Colorado Company claims a difference of 180 feet of rails against it during the year 1897, as is shown by its Exhibit No. 3 to the Agreed Statement of Facts, dated September 6th, 1904. Explain this, if you can?

A. There was 180 feet of rail charged in the bill, but it was used for guard-rails, making guard-rails, and as there was no rail taken out of track, there would be no credit.

Q23. You mean that while it was taken out of the track proper it was used in the same track as guard-rail?

A. No; it could have been rail brought from some other point for that purpose. It would not necessarily have to have been taken out of the track on that line. There was no credit allowed for the reason that there was none taken out of track.

Q24. You may state whether in the examinations testified to by you, you covered all the period between December 31st, 1886, and May 7th, 1902, for which the records and ac-
684 counts were not destroyed or lost? A. Yes, sir.

Adjourned by consent until Thursday a. m., March 9th, 1905.

Adjourned by consent from Thursday, 10:00 o'clock a. m., March 9th, until 2:00 p. m. of same day.

Pursuant to adjournment, parties met Thursday, March 9th, at 2:00 o'clock p. m., at same place, and the following proceedings were had:

Present: Frank Hagerman, Esq., and W. F. Evans, Esq., on behalf of the St. Louis, Kansas City & Colorado Railroad Company, intervenor; C. N. Travous, Esq., on behalf of the Wabash Railroad Company.

Cross Examination of William M. Tait,

By Mr. Hagerman:

XQ1. As I understand, the period of time covered by your examination in reference to the two statements of clerical errors of which you speak, represented by Exhibits "2" and "3", you only could obtain figures for the years 1890 to 1893 for the reason that you couldn't find the records? A. Yes, sir.

XQ2. You don't know what records were or were not burned? A. No, sir.

XQ3. Now, have you in connection with your statement shown as Exhibit "1," prepared an additional statement of the same items identifying the particular track designated by you by the name which is shown upon the map, "Exhibit D," to one of the "Agreed Statements of Facts"?

A. In connection with Mr. Andrews, I assisted in preparing a statement of that character.

685 XQ4. And that statement which I hand, to be marked as Exhibit "4" to Tait's Deposition, will show in reference to these different items where in your statement the name of one company was used and it appears under some special designation in the plat, so that it can be identified, like the first item in your Exhibit "1," you name it as the Consolidated Coal Co. track, that appears on Exhibit "D" as the Maguire Coal Co. track? A. Yes, sir.

XQ5. And that Exhibit "4" will show each item, as to that?

A. Yes.

XQ6. So that where, in these different items, you have used the name of a track different from the name shown on the Exhibit, that fact is noted in this Exhibit "4"? A. Yes, sir.

XQ7. Now, I notice in Exhibit "4," under the item showing the cost of the material that went into a particular side track, an itemized statement. What does that show?

A. That shows the material used in that side track.

XQ8. It shows it in detail, don't it?

A. In detail, taken from side track reports.

XQ9. The way that you had gotten it up in your statement was by classifying in three or four classes? A. Four classes.

XQ10. And as prepared in Exhibit "4" it shows it in detail? A. Yes, sir.

XQ11. Thus, in Exhibit "4," over the head of one column appears "Wabash Bill," with a number following, followed by certain items. What does that indicate?

A. That is copied from the bills rendered by the Wabash Railroad against the Colorado; detail of material used during that month on the main line.

686 XQ12. That is, under that head you have given a detailed statement of the amount of material charged in that month against the Colorado Company in that bill?

A. Yes, sir.

XQ13. And this statement in Exhibit "4" as thus made up is correct, is it? A. Yes, sir.

XQ14. In getting at these items showing what went to make up the material that was used in these respective side tracks shown by Exhibit "4" and the material charged in the respective Wabash bills, during what period did you find records or books pertaining thereto?

A. I found one report for 1889 and then the book between that period and, I think it was 1891, was missing; there was one book missing. Could find no records showing disposition of charges for material between January, 1889, and 1895.

XQ15. That is, you had no access to any record showing any accounts between January, 1889, and 1895? A. No, sir.

XQ16. Now, from what book or paper did you prepare the statement as to 1889, January?

A. An impression book from the Superintendent's office at Moberly.

XQ17. Containing what?

A. Containing miscellaneous reports, side tracks, etc., Regular report book.

XQ18. Now, I notice in the "Second and Partial Agreed Statement of Facts," a statement as to different items for a certain period, the Wabash Company charged the Colorado Colorado Company a certain track material which was paid by the Colorado Company, but that there was nothing in the bills of the Wabash Company rendered the Colorado Company to show in what track or tracks the material so charged
687 for was used, other than is to be inferred from the character of the material so charged, etc. You have seen that statement in reference to the different items?

A. You mean that—

XQ19. In the "Partial Agreed Statement of Facts"?

A. Yes, sir.

XQ20. Now, take your item No. 1, for instance, in Exhibit No. "4," for illustration: There is 420 pounds of bolts that are charged in the Wabash bill; what is there in any record showing as to what particular track that went into?

A. There is no record showing the particular track.

XQ21. That is to say: The statement in the "Agreed Statement of Facts," as to what I quoted to you, which says that there is nothing in the bills of the Wabash Company to show in what track or tracks the material so charged for was used, would apply to all the other records that you examined of the Wabash Company; there would not be anything to show what particular track it went into?

A. The instructions were issued to the foremen to report material used on joint track in those reports, which was supposedly done.

XQ22. That you have no personal knowledge about?

A. About those instructions?

XQ23. Yes? A. Yes, sir.

XQ24. Well, what knowledge have you on that subject?

A. Well, the Superintendent's office notified the General Roadmaster's office that the separate reports must be made.

XQ25. As to what?

A. One to cover material used in the joint track.

688 XQ26. And the other?

A. The other material in total. That is, a tool and material report.

XQ27. Was that instruction in writing?

A. Originally the instructions were issued in writing.

XQ28. Do you know where a copy of that instruction could be found? A. I do not.

XQ29. Well, what the section foreman would do would be to make one report of material in toto that was used upon any given section?

A. That would be his regular monthly report.

XQ30. Like the report in toto that was offered in evidence here by one of the witnesses as to the amount of labor in toto for any particular month? A. Yes, sir.

Q. Now, then, what other kind of a report was made?

A. There was a supplemental report covering material used in joint track.

XQ31. Anything else appear on it than that?

A. Not supposed to.

XQ32. Well, would that be the heading of it?

A. Well, the original intention was to have that heading; it may be the foreman did not head it just that way.

XQ33. Have you one of the forms of a report of that character?

A. It is just a piece of letter-paper, the only ones I ever saw.

XQ34. And it would not indicate anything further than that as to the track in which it was used?

A. I don't think so.

XQ35. Other than in that way, would there be any way from any of the records of the Wabash Company to show what portion of these materials that were included in the Wa-

689 bash bill went to any particular place? A. No, sir.

XQ36. So that, take the item of, for instance, 420 pounds in item 1 of Exhibit "4," all that you would have, so far as the records of the Wabash Company are concerned, would be that there were that many pounds of bolts used?

A. Charged in that bill, you mean?

XQ37 Charged in that bill?

A. It would be taken from the foreman's report.

XQ38. Yes; and there would not be anything to show in what particular tracks that went? A. No, sir.

XQ39. Now, then, on the other side of that account in the itemized statement of the total amount of material that went

into the track, there shown by item 1, there is 200 pounds of bolts charged, for illustration: Where would you get the information as to that?

A. From the side track report furnished to the Superintendent's office by the General Roadmaster, from which we would make our side track report to the Auditor.

XQ40. Well, now, as I understand you, one report would go in from the foreman showing the material in toto for a month, and then another report would go in from the foreman showing the portion, or supposed to show the portion that was used on joint track, whatever that might be? A. Yes.

XQ41. Now, then, was there an additional report as to what you call side tracks or industrial tracks?

A. There was a report made for every new side track put in. Sometimes they would run three or four months.

690 XQ42. When a new track was put in there would be an additional report? A. Yes, sir.

XQ43. And that would cover the case for an additional or new track whenever that was put in? A. Yes, sir.

XQ44. So that in seeking to ascertain as to Exhibit "4" whether any particular item representing material that went in the side track was included in the Wabash bill, it would have to be determined from the character of the work and not from the particular report, so far as your records are concerned?

A. It would have to be ascertained from the character of the material.

XQ45. To give an illustration, which you explained to me just before I commenced the cross-examination: In item one under the head of the "Wabash Bill" of Exhibit "4" there appear 3,080 feet of 63-lb. rail and upon the same bill there is credited 3,080 feet of 52-lb. rail; now, the way that you would ascertain for yourself as to where that 63-lb. rail went in would be to draw the inference from those two items that 3,080 feet of 52-lb. rail was taken out and the same number of feet substituted of the heavier rail?

A. Yes, sir; and then the number of feet of rail there is a great deal more than the length of this one track.

XQ46. And what I have said would be true with reference to the other items, now, in Exhibit "4" that you would have to, as we said in our "Agreed Statement of Facts," practically ascertain it from the character of the work rather than from the particular report? A. In some instances, yes, sir.

691 XQ47. Well, in practically all instances, wouldn't you either ascertain it from the character of the work or some such significance as would attach to an item like that to which I called you attention in Exhibit "4"?

A. Yes, sir.

XQ48. The reason I ask you: I understand you and Mr. Andrews didn't go to Moberly to check up to see whether there was any particular record to show where any particular stuff in the bill went to, and if a trip of that kind would be useless, we don't want to make it, that's all. I am correct in that assumption, ain't I? A. Yes, sir.

XQ49. Now, for these periods of which you speak, where you didn't find records, do you mean that you couldn't find this impression book in which the statements were copied and reports were copied?

A. I couldn't locate any of the records pertaining to the—

XQ50. During those periods? A. Those periods.

XQ51. Now, what other periods were there for which you couldn't locate any records?

A. Well, it goes along from January, 1895, to May 7th, 1902.

XQ52. Then you didn't find the records for that period?

A. Yes, sir.

XQ53. But you didn't find any records after January, 1889, up to January, 1895? A. No records of material.

XQ54. Well, did you find records of labor?

A. We had a report of side tracks, but no records showing disposition of the charges.

XQ55. In what kind of a record was what you found?

A. Side track impression book.

692 XQ56. That book you found?

A. That is from 1894 to latter part of 1901, I believe.

Re-direct Examination

By Mr. Travous:

RDQ1. This statement made Exhibit "4" to your deposition by Mr. Hagerman was prepared when?

A. It was prepared the latter part of last week, about March—

RDQ2. Since the last adjournment of the taking of these depositions? A. Yes, sir.

RDQ3. And for the purpose of your cross-examination?

A. Yes, sir.

RDQ4. And in conjunction with Mr. Andrews of the Colorado Company? A. Yes, sir.

RDQ5. And at the request of that Company?

A. Yes, sir.

RDQ6. You have shown on this Exhibit "4" the different items of material that entered into the construction of the different tracks. Is that correct? A. Yes, sir.

RDQ7. Those are the items appearing on the left hand side of the page? A. Yes, sir.

RDQ8. Now, what are the items that appear on the right hand side of the page?

A. Material charged to joint track that is included in the bill against the Colorado for maintaining joint track.

RDQ9. Take one item and say whether in your opinion the items on the right hand side included in Wabash Bill No. 11660 embraced material used in the joint track or used in the Maguire Coal Co. track, and give your reasons.

By Mr. Hagerman: I object to that as calling for a conclusion and as incompetent.

693 A. It was used in the joint track, in my opinion.

RDQ10. Give your reasons?

By Mr. Hagerman: Same objection.

A. For the reason that it is not similar material, in some instances, as that used in the side tracks; there is more material used in the side tracks than is charged in the bill, especially on fastenings, and the weight of the majority of the rail used in the side tracks is different from that shown as used, on the bill. The bill shows a credit for an equal amount of rail taken out as was charged, showing they released rail when they used this rail. There is no switch charged in the bill; there was a switch and switch ties used in the side track. There is 121 feet of 52-lb. iron rail charged in the bill, and there was no 52-lb. rail used in this side track. There was 380 track ties used in the side track and none charged in the bill. That is my reasons for thinking that it does not cover the same material and that this material was used in the joint track.

RDQ11. From your knowledge of the way the reports were made up and the record kept, would it, in your judgment, have been possible for this bill, if it was intended to cover the material used in the Maguire Coal Company track or any part of it, to have differed in these items so much from the items of materials used in that track?

By Mr. Hagerman: Same objection.

A. No, sir; not in the amounts that they do differ; it would hardly have been possible.

RDQ12. Now, without interrogating you as to each of the other items separately, I wish you would state whether what you have said in respect to item 1 and your reasons for

694 saying that Bill 11660 did not include any of the material used in the Maguire Coal Company track, will apply to the other items shown on this Exhibit "4"?

By Mr. Hagerman: We object to that as calling for a conclusion and incompetent.

A. Yes; I think it covers every case except in one instance, No. 16, as to switch-ties and cross-ties.

RDQ13. Well, explain fully as to that?

A. There is two sets of ties shown in the side track report and three sets charged in the bill; there is 462 cross-ties charged to side tracks and 150 charged in the bill, but as to other material, I think the same would apply. While there is over 9 tons of rail charged in the bill—it is 70-lb. rail—there is 17 tons used in that side track, and then they allow credit for frog scrap, cast scrap and wrought scrap, wrought scrap would cover spikes and bolts; they also allow credit for an equal amount of rail taken out of the track when they charged for the 9 tons, showing it is a similar case to Item No. 1.

RDQ14. And your judgment is that that bill did not include any of the material used in the construction of the Logwood and DeCamp track?

By Mr. Hagerman: Same objection.

A. Yes, sir.

RDQ15. In other words, that while there is a similarity between some of the items as to the kind of material used, because of the dissimilarity as to most of the items and differences in the material for the reasons you have given, your judgment is that that bill did not include any of the material used in that track?

695 By Mr. Hagerman: Same objection.

A. Yes, sir.

(2) Cross Examination

By Mr. Hagerman:

2XQ1. I want to ask you one more question. At the head of the column on the right hand side of the page where you say Wabash Bill No. so and so, that means Wabash bill for the corresponding month? A. Yes, sir; that is the Auditor's No.

By consent of the counsel the taking of these depositions is adjourned until Friday morning, March 10th, at 10:00 o'clock.

Pursuant to adjournment, parties met at same place at 10:00 o'clock Friday morning, March 10th, 1905. Present, counsel as before.

Continuation of Cross Examination of Mr. Tait

By Mr. Hagerman:

2XQ2. I hand you a statement marked Exhibit "5," which purports to be a statement as to certain other industrial tracks than those named by you in which bills were rendered by the Wabash Company against the Colorado Company to include some portion of the work. Have you checked them over to see whether they are correct or not, according to your records?

By Mr. Travous: Objected to, as it does not relate to matters that I examined him about in chief, and is not proper cross-examination.

A. I checked the statement of charges for new tracks and repairs to some tracks.

2XQ3. And this statement is correct, according to your records? A. According to the check rolls.

696 By Mr. Hagerman: This is offered in evidence, and I request that it be marked (Tait's) Exhibit "5."

By Mr. Travous: Objected to, because not pertaining to the matters examined about in chief, and not cross-examination.

By Mr. Hagerman: We give notice that if the Court holds this is not proper cross examination, we will offer it as direct evidence upon our part.

By consent, the signature to Mr. Tait's deposition is waived.

(2) Re-direct Examination

By Mr. Travous:

2RDQ1. Mr. Tait, referring to the statement just made, Exhibit "5" to your deposition, by Mr. Hagerman, I wish you would state whether you found that the different items, as they are numbered in that statement, contain any errors or are the result of errors, and if so, explain so far as you can, how those errors seem to have occurred?

A. Why, from examination the whole thing appears to have been an error or oversight on the part of the party making reports for the Superintendent's office from which to prepare the bills against the Colorado; that is, the General Roadmaster's clerk evidently erred in making his reports to the Superintendent's office, as in making this report he had positive instructions to deduct any repairs or labor expense in building side tracks, and he evidently didn't do it in these cases.

2RDQ2. Do you know what clerk that was who made out those reports that you speak of?

A. Mr. Tufts, who has been clerk there since '86; he evi-
697 dently paid no attention to the distribution on the back of the check roll when making up the reports to the Superintendent's office.

By consent of counsel the signature of Mr. Tait is waived.

Fred W. Woreheide, of lawful age, being produced, cautioned and sworn to testify the whole truth, and carefully examined, deposes and says as follows:

Direct Examination

By Mr. Travous:

Q1. State your name? A. F. W. Woreheide.

Q2. You are in the employ of the Wabash Railroad Company, are you? A. The Wabash Railroad Company.

Q3. Please look at this paper which I hand you and state whether you remember delivering the original of that to some person, and if so, state whom and when, and where?

A. Yes; I delivered the statement of this paper here to John Scullin in January, about, 1900.

Q4. You can look at your affidavit and see if you can refresh your recollection as to the exact date?

A. Yes, the tenth day of January, 1900.

Q5. Do you know whether John Scullin was at the time President or what position he held?

A. He was President of the Colorado Company.

By Mr. Travous: This is offered in evidence as (Woreheide's) Exhibit No. "1."

By consent the signature of Mr. Woreheide to his deposition is waived.

By consent it is agreed that a copy of the above paper be submitted in evidence as (Woreheide's) Exhibit No. "1."

698 State of Missouri,
City of St. Louis—ss.

I, Everett H. Smith, a Notary Public for the City of St. Louis, State of Missouri, do hereby certify that, by agreement of counsel on notice, came before me at the office of C. N. Travous, Esq., Room 1115 Lincoln Trust Building, 706 Chestnut street, in the City of St. Louis, State of Missouri, on the twenty-first day of February, 1905, at 1:30 p. m. of said day, and at such other dates as the taking of depositions was by agreement of counsel deferred, as appears set forth in the foregoing depositions, William F. Tufts, B. F. Taylor, Edward B. Pryor, Henry L. Magee, and William M. Tait, and Fred W. Woreheide, all of lawful age, who were by me cautioned and sworn to testify the whole truth, and carefully examined; that their testimony as above set forth was taken by me in shorthand by consent of counsel and afterwards transcribed on the typewriter, and that the signatures of said witnesses to their several depositions were waived by consent of counsel, and their depositions are now herewith returned.

I further certify that the said William F. Tufts is a resident of Moberly, Mo.; that the said B. F. Taylor is a resident of Truesdale, Mo.; that the said Edward B. Pryor is a resident of the City of St. Louis, Mo.; that the said Henry L. Magee

is a resident of the City of St. Louis, Mo.; that the said William M. Tait is a resident of Moberly, Mo. and that the said Fred W. Woerheide, is a resident of the City of St. Louis, Mo. I further certify that the said depositions were retained and kept in my possession until they were, together
699 with the notice for taking same, and the Exhibits attached thereto, by me sealed up and delivered by me to said Court; that I am not of counsel or attorney to either of the parties, nor interested in the event of said cause or proceeding; and I further certify that I am duly qualified as a Notary Public, and that my term expires on the 23d day of January, 1909.

In Testimony Whereof, I have hereunto set my hand and affixed my notarial seal at the City of St. Louis, in the State of Missouri, this 3d day of April, 1905.

(Seal (Signed) EVERETT H. SMITH,
Notary Public, City of St. Louis, Mo.

(TAYLOR'S) EXHIBIT NO. 2.

THE

ROAD DEPARTMENT.

REPORT of LABOR performed on WE

No.	NAME.	Occupation	1	2	3	4	5	6	7	8	7	10	11
1	Benjamin Taylor	Foreman											
2	John Marsan	Labor											
3	William Reagan	"											
4	Michael Frarick	"											
	Dave Hutcherson	"											
6	Fields Lamy	"											
7	George Watkins	"											
8													
9	Expense %	Labor worken											
10	at St.	Charles											
11													
12													
13													
14													
15													

REMARKS:

I CERTIFY that the men named above were employed during the specified. in the service of the Wabash Railroad Co.

BEN. TAYLOR.

P

Form 996.

THE WABASH RAILROAD COMPANY. WESTERN **Division.**

CHECK ROLL No. 14 **District.**

on WEST OF FORSIST JUNCTION *for Month of* NOV. 30. 1898

7	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	27	30	31	Hours.	Days.	Months.	RATES OF PAY Hr. C.	Per Day D.	Per Day C.	Per Mo. D.	Per Mo. C.	Amount	Deductions.	Amount Due.
							1	1																							4	33		4	33
							1	1																			1	25			2	50		2	50
							1	1																			1	25			2	50		2	50
							1	1																			1	25			2	50		2	50
							1																				1	25			1	25		1	25
							1	1																			1	25			2	50		2	50
							1																				1	25			1	25		1	25
																															16	88		16	88

ring the time EXAMINED AND FOUND CORRECT. APPROVED.

Printed form in italics.
Roman type written by section foreman.

703 (Taylor's) Exhibit No. 3.

Ewing Ave., St. Louis,
11/30, 1898.

A. S. Haynes, G. R. M.

Material and Tools used on Section No. 1 East of F. Junction.

541 No. 2 Ties Renewal.
2#Spikes Renewal.
100#Scrap Spikes.
200#Track Bolts, New.
500 Nut Locks.
8 Spike Maul Handles.
1 Pony Switch Stand, old.
1 Pony Switch Stand, scraped.
1 Switch Point (63) Lb.
1 Switch Point Scraped.
38 Galon M. T. Oil.

BENJ. TAYLOR,
Foreman Sec. 1.

Endorsement:
Nov. 1898.

Nov. 1898.

705 **Taylor's Exhibit No. "5."**

Form 940.

The Wabash Railroad Company.

Report of Material Used and Labor Performed on Section No. *1* for week ending *July 14*, 1900.

Material Used.	Received.	Used.	On Hand.
Cross Ties, No. 1	....	....	....
Cross Ties, No. 2	....	....	*1619*
Cross Ties, culls	....	....	*300*
Switch Ties, No. sets	....	....	*1*
Feet of Crossing Plank, Pine Plank	....	*35*	....
Fence Posts	....	....	....
Feet of Fence Boards	....	....	....
Fence Wire, No. spools	....	....	....
Frogs	....	*1*	*17*
Kegs of Spikes	....	*5*	*5*
Kegs of Bolts	....	*2*	*1*
Angle Bars	....	....	....
Old Splices	....	....	....
Nut Locks	....	*500*	*1000*
New Steel Rail. No. feet	....	....	....
Old Steel Rail, main track, No. feet	....	....	....
Old Steel Rail, siding, No. feet	....	....	....
No. of Shims	....	....	....

Cross Ties Used.	No. 1.	No. 2.	Culls.
On mile 6 & 4. *6 Day Laying new Track at Newstead Ave.*			
On sidings	....	....	....
Total	....	....	....

Labor Performed.	No.
No. Rails changed, main track	....
No. Rails changed, sidings	....
No. Rails broken, main track	....
No. Rails broken, sidings	....
Feet of Track ballasted, stone	....
Feet of Track ballasted, gravel	....
Feet of Track ballasted, sand	....
Feet of Track ballasted, cinders	....
Feet of Track surfaced, dirt	....
Feet of New Ditch	....
Feet of Ditch cleaned	....
Feet New Siding built	....
Feet Old Siding taken up	....
Feet of Fence built	....
Feet of Fence repaired	....
No. cars Stone loaded	....
No. cars Stone unloaded	....
No. cars Gravel loaded	....
No. cars Gravel unloaded	....
No. cars Sand loaded	....
No. cars Sand unloaded	....
No. cars Cinders loaded	....
No. cars Cinders unloaded	....
No. cars New Ties unloaded	....
No. cars Old Ties loaded	....
No. cars Old Rails loaded	....
No. cars Old Rails unloaded	....
No. cars Other Material loaded	....
No. cars Other Material unloaded.	....
No. Days' Labor during week, not including Foreman	5

B. F. Taylor, Foreman.

Roman type printed form, italic type written by section foreman.

706 **Taylor's Exhibit No. "6."**

Form 940.

The Wabash Railroad Company.

Report of Material Used and Labor Performed on Section No. *1* for week ending *July 21*, 1900.

Material Used.	Received.	Used.	On Hand.
Cross Ties, No. 1...	....	....	....
Cross Ties, No. 2...	....	*152*	*1467*
Cross Ties, culls....	....	....	*300*
Switch Ties, No. sets	....	....	*1*
Feet of Crossing Plank, Pine Plank	....	*36*	....
Fence Posts.....	....	....	....
Feet of Fence Boards	....	....	....
Fence Wire, No. spools	....	....	....
Frogs	....	*1*	*17*
Kegs of Spikes.....	....	*10*	*1*
Kegs of Bolts.....	....	*3*	*1*
Angle Bars.....	....	....	....
Old Splices.....	....	....	....
Nut Locks.....	....	*1000*	*500*
New Steel Rail. No. feet	....	....	....
Old Steel Rail, main track, No. feet....	....	....	....
Old Steel Rail, siding, No. feet.....	....	....	....
No. of Shims.....	....	....	....

Cross Ties Used.	No. 1.	No. 2.	Culls.
On mile *1* & *4*. *2 days Repairing Track.* *4 days puting in New Tracks for Boulevard.*			
On Sidings.....	....	....	....
Total	....	....	....

Labor Performed.	No.
No. Rails changed, main track.....	....
No. Rails changed, sidings.....	....
No. Rails broken, main track.....	....
No. Rails broken, sidings.....	....
Feet of Track ballasted, stone.....	....
Feet of Track ballasted, gravel....	....
Feet of Track ballasted, sand	....
Feet of Track ballasted, cinders...	....
Feet of Track surfaced, dirt.....	....
Feet of New Ditch	....
Feet of Ditch cleaned	....
Feet New Siding built.....	....
Feet Old Siding taken up.....	....
Feet of Fence built.....	....
Feet of Fence repaired.....	....
No. cars Stone loaded	....
No. cars Stone unloaded.....	....
No. cars Gravel loaded.....	....
No. cars Gravel unloaded.....	....
No. cars Sand loaded.....	....
No. cars Sand unloaded	....
No. cars Cinders loaded	....
No. cars Cinders unloaded.....	....
No. cars New Ties unloaded.....	....
No. cars Old Ties loaded.....	*1*
No. cars Old Rails loaded	....
No. cars Old Rails unloaded.....	....
No. cars Other Material loaded...	....
No. cars Other Material unloaded.	....
No. Days' Labor during week, not including Foreman.....	*57*

B. F. Taylor, Foreman.

Roman type printed form, italic type written by section foreman.

707 **Taylor's Exhibit No. "7."**

Endorsed: No. 76, B. F. Taylor, July, 1900.

Form 940.

The Wabash Railroad Company.

Report of Material Used and Labor Performed on Section No. *1* for week ending *July 31*, 1900.

Material Used.	Received.	Used.	On Hand.
Cross Ties, No. 1	....	....	....
Cross Ties, No. 2	....	....	*1356*
Cross Ties, culls	....	....	....
Switch Ties, No. sets	....	....	*1*
Feet of Crossing Plank, Pine Plank	....	*36*	....
Fence Posts	....	....	....
Feet of Fence Boards	....	....	....
Fence Wire, No. spools	....	....	....
Frogs	....	....	*17*
Kegs of Spikes	....	....	*1*
Kegs of Bolts	....	....	....
Angle Bars	....	....	....
Old Splices	....	....	....
Nut Locks	....	....	*500*
New Steel Rail. No. feet	....	....	....
Old Steel Rail, main track, No. feet	....	....	....
Old Steel Rail, siding, No. feet	....	....	....
No. of Shims	....	....	....

Cross Ties Used.	No. 1.	No. 2.	Culls.
On mile *1 & 4.*			
4 days repairing Track.			
5 Days puting in Tracks for Polar Wave.			
On Sidings	....	....	....
Total	....	....	....

Labor Performed.	No.
No. Rails changed, main track	....
No. Rails changed, sidings	....
No. Rails broken, main track	....
No. Rails broken, sidings	....
Feet of Track ballasted, stone	....
Feet of Track ballasted, gravel	....
Feet of Track ballasted, sand	....
Feet of Track ballasted, cinders	....
Feet of Track surfaced, dirt	....
Feet of New Ditch	....
Feet of Ditch cleaned	....
Feet New Siding built	....
Feet Old Siding taken up	....
Feet of Fence built	....
Feet of Fence repaired	....
No. cars Stone loaded	....
No. cars Stone unloaded	....
No. cars Gravel loaded	....
No. cars Gravel unloaded	....
No. cars Sand loaded	....
No. cars Sand unloaded	....
No. cars Cinders loaded	....
No. cars Cinders unloaded	....
No. cars New Ties unloaded	....
No. cars Old Ties loaded	....
No. cars Old Rails loaded	....
No. cars Old Rails unloaded	....
No. cars Other Material loaded	....
No. cars Other Material unloaded.	....
No. Days' Labor during week, not including Foreman	*62*

***B. F. Taylor*, Foreman.**

Roman type printed form, italic type written by section foreman.

(TAYLOR'S) EXHIBIT NO. 8.

THE W

ROAD DEPARTMENT.

REPORT of LA

No.	NAME.	Occupation.	1	2	3	4	5	6	7	8	9	10	11	12	1
1	Benjamin Taylor	Foreman													
2	Martin Kinney	Labor	1	1	1	1	1	0	1	1	1	1	1	1	
3	Chriseph Bemble	Track Walker	1	1	1	1	1	1	1	1	1	1	1	1	
4	George Smith	Labor	1	1	1	1	1	0	1	1	1	1	1	1	
5	John Ryan	Labor	1	1	1	1	1	0	1	1	1	1	1	1	
6	William McFadden	Labor	1	1	1	1	1	0	1	1	1	1	1	1	
7	Thomas Brady	Labor				1	1	0	1	1	1	1	1	1	
8	John Miller	Labor	1	1	1	1	1	1	1						
9	John Moran	Labor							1	1	1	1	1	1	
10	Morn Collins	Labor	1	1	1	1	1	1	1	1	1	1	1	1	
11	Mery Driscoll	for Boarde													
12	Herman Schome	for Boarde													
13	Wabash Horspittle	fees													
14															
15															

REMARKS:

I CERTIFY that the men named above were employed during the time specified, in the service of the Wabash Railroad Co.

B. F. TAYLOR.

Printe
Ro

Form 996.

THE WABASH RAILROAD COMPANY. WESTERN **Division.**

CHECK ROLL No._____ 14 **District.**

REPORT of LABOR performed on SECTION NO. 1 *for Month of* JANUARY 31, *190*

3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Hours.	Days.	Months.	RATES OF PAY. Hr. C.	Per Day D. | C	Per Mo. D. | C.	Amount	Deductions.	Amount Due.
																														31				65 00	65 00	50	64 50
1	1	1	0	1	1	1	1	1	1	0	1	1	1	1	1	1	0	1	1	1	1	1	1	0	1	1	1	1		27			1 25	65 00	33 75	35	33 40
1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	2	1	1	1	1	1	1	2	1	1	1	1		33			1 25		41 25	35	40 90
1	1	1	0	1	1	1	1	1	1	0	1	1	1	1	1	1	0	1	1	1	1	1	1	0	1	1	1	1		27			1 25		33 75	16 00 35	17 40
1	1	1	0	1	1	1	1	1	1	0	1	1	1	1	1	1	0	1	1	1	1	1	1	0	1	1	1	1		27			1 25		33 75	35	33 40
1	1	1	0	1	1	1	1	1	1	0	1	1	1	1	1	1	0	1	1	1	1	1	1	0	1	1	1	1		27			1 25		33 75	16 00 35	17 40
	1	1	0	1	1	1	1	1	1	0	1	1	1	1	1	1	0	1	1	1	1	1	1	0	1	1	1	1		24			1 25		30 00	15 50 35	14 15
1	1	1	1	1																P	ai	d		c	k			ck	7			1 25	Ck.	8 75		8 75
				1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1				0	1	1	1	1		21					26 25	35	25 90
1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1					P	ai	d		c	k			ck	18					22 50	35	32 15
																																					32 00
																																					15 50
																																					2 30
																													2	11					328 75	50 80	328 75

were employed during the time

Co.

TAYLOR.

EXAMINED AND FOUND CORRECT.

WM. NIETMAN.

APPROVED.

Printed form in italics.
Roman type written by section foreman.

CLASSIFICATION OF LABOR.

Section No. *1* for month of *January 31* 190*1*

ACCOUNT.	No. of Days.	AMOUNT.	
Handling Coal,			
" Wood,			
Repairs Bridges,			
" Buildings,			
" Fences,			
" Roadway and Track,	*211*	*328*	*75*
" Telegraph,			
Wrecking Freight,			
" Passenger			
Cattle Guards and Road Crossings,			
Cross Ties,			
Ditching,			
New Fence,			
Frogs and Switches,			
Surfacing Tracks,			
Ballasting,			
New Side Tracks,			
New Iron and Steel Laid (main track),			
Cutting Grass and Weeds,			
Housing Ice,			
Transferring Freight,			
Clearing Snow and Ice,			
	211	*328*	*75*

NOTE.—Total of Classification must agree with Total of Check Roll.

710 **Taylor's Exhibit No. "9."—Page 1.**

Form 940.

The Wabash Railroad Company.

Report of Material Used and Labor Performed on Section No. *1* for week ending *Jan. 14*, 1901.

Material Used.	Received.	Used.	On Hand.	Labor Performed.	No.
Cross Ties, No. 1...	....	....	....	No. Rails changed, main track.....	....
Cross Ties, No. 2...	....	....	*100*	No. Rails changed, sidings.....	....
Cross Ties, culls....	....	*50*	*455*	No. Rails broken, main track.....	....
Switch Ties, No. sets	....	....	....	No. Rails broken, sidings.....	....
Feet of Crossing Plank	....	....	....	Feet of Track ballasted, stone.....	....
Fence Posts.....	....	....	....	Feet of Track ballasted, gravel....	....
Feet of Fence Boards	....	....	....	Feet of Track ballasted, sand	....
Fence Wire, No. spools	....	....	....	Feet of Track ballasted, cinders...	....
Frogs	....	....	*6*	Feet of Track surfaced, dirt.....	....
Kegs of Spikes.....	....	*5*	*6*	Feet of New Ditch	....
Kegs of Bolts.....	....	....	*2*	Feet of Ditch cleaned	....
Angle Bars.....	....	....	....	Feet New Siding built.....	....
Old Splices.....	....	....	....	Feet Old Siding taken up.....	....
Nut Locks.....	....	....	*800*	Feet of Fence built.....	....
New Steel Rail. No. feet	....	....	....	Feet of Fence repaired.....	....
Old Steel Rail, main track, No. feet....	....	....	....	No. cars Stone loaded	....
Old Steel Rail, siding. No. feet.....	....	....	....	No. cars Stone unloaded.....	....
No. of Shims.....	....	....	....	No. cars Gravel loaded.....	....
Cross Ties Used.	No. 1.	No. 2.	Culls.	No. cars Gravel unloaded.....	....
				No. cars Sand loaded.....	....
				No. cars Sand unloaded	....
				No. cars Cinders loaded	....
On mile *1* & *4*.				No. cars Cinders unloaded, Foundry	*5*
6 Days Repairing Tracks.				No. cars New Ties unloaded.....	....
				No. cars Old Ties loaded.....	....
				No. cars Old Rails loaded	....
				No. cars Old Rails unloaded.....	....
				No. cars Other Material loaded...	....
On Sidings.....	....	....	....	No. cars Other Material unloaded.	....
Total	....	....	....	No. Days' Labor during week, not including Foreman.....	*44*

***B. F. Taylor,* Foreman.**

Roman type printed form, italic type written by section foreman.

711 **Taylor's Exhibit No. "9."—Page 2.**

Form 940.

The Wabash Railroad Company.

Report of Material Used and Labor Performed on Section No. *1* for week ending *Jan. 21,* 1901.

Material Used.	Received.	Used.	On Hand.
Cross Ties, No. 1	....	....	....
Cross Ties, No. 2	....	*25*	*175*
Cross Ties, culls	....	....	*425*
Switch Ties, No. sets	....	....	....
Feet of Crossing Plank	....	....	....
Fence Posts	....	....	....
Feet of Fence Boards	....	....	....
Fence Wire, No. spools	....	....	....
Frogs	....	....	*6*
Kegs of Spikes	....	....	*4*
Kegs of Bolts	....	....	*2*
Angle Bars	....	....	....
Old Splices	....	....	....
Nut Locks	....	....	*800*
New Steel Rail. No. feet	....	....	....
Old Steel Rail, main track, No. feet	....	....	....
Old Steel Rail, siding, No. feet	....	....	....
No. of Shims	....	....	....

Cross Ties Used.	No. 1.	No. 2.	Culls.
On mile *1* & *4*. *5 Days tien and platen and repairing Track.* *1 Day Loaden Cinders.*			
On Sidings	....	....	....
Total	....	....	....

Labor Performed.	No.
No. Rails changed, main track	....
No. Rails changed, sidings	....
No. Rails broken, main track	....
No. Rails broken, sidings	....
Feet of Track ballasted, stone	....
Feet of Track ballasted, gravel	....
Feet of Track ballasted, sand	....
Feet of Track ballasted, cinders	....
Feet of Track surfaced, dirt	....
Feet of New Ditch	....
Feet of Ditch cleaned	....
Feet New Siding built	....
Feet Old Siding taken up	....
Feet of Fence built	....
Feet of Fence repaired	....
No. cars Stone loaded	....
No. cars Stone unloaded	....
No. cars Gravel loaded	....
No. cars Gravel unloaded	....
No. cars Sand loaded	....
No. cars Sand unloaded	....
No. cars Cinders loaded	*12*
No. cars Cinders unloaded	....
No. cars New Ties unloaded	....
No. cars Old Ties loaded	....
No. cars Old Rails loaded	....
No. cars Old Rails unloaded	....
No. cars Other Material loaded	....
No. cars Other Material unloaded	....
No. Days' Labor during week, not including Foreman	*43*

***B. F. Taylor,* Foreman.**

Roman type printed form, italic type written by section foreman.

712 **Taylor's Exhibit No. "9."—Page 3.**

Form 940.

The Wabash Railroad Company.

Report of Material Used and Labor Performed on Section No. *1* for week ending *Jan. 7, 1901.*

Material Used.	Received.	Used.	On Hand.
Cross Ties, No. 1	....	....	....
Cross Ties, No. 2	....	....	*160*
Cross Ties, culls	....	....	....
Switch Ties, No. sets	....	....	....
Feet of Crossing Plank	....	....	....
Fence Posts	....	....	....
Feet of Fence Boards	....	....	....
Fence Wire, No. spools	....	....	....
Frogs	....	....	*6*
Kegs of Spikes	....	....	*2*
Kegs of Bolts	....	....	*2*
Angle Bars	....	....	....
Old Splices	....	....	....
Nut Locks	....	....	*800*
New Steel Rail. No. feet	....	....	....
Old Steel Rail, main track, No. feet	....	....	....
Old Steel Rail, siding, No. feet	....	....	....
No. of Shims	....	....	....

Cross Ties Used.	No. 1.	No. 2.	Culls.
On mile *1* & *4*.			
2 Days Loaden Foundry Cinders.			
4 Days Repairing Track.			
On Sidings	....	....	....
Total	....	....	....

Labor Performed.	No.
No. Rails changed, main track	....
No. Rails changed, sidings	....
No. Rails broken, main track	....
No. Rails broken, sidings	....
Feet of Track ballasted, stone	....
Feet of Track ballasted, gravel	....
Feet of Track ballasted, sand	....
Feet of Track ballasted, cinders	....
Feet of Track surfaced, dirt	....
Feet of New Ditch	....
Feet of Ditch cleaned	....
Feet New Siding built	....
Feet Old Siding taken up	....
Feet of Fence built	....
Feet of Fence repaired	....
No. cars Stone loaded	....
No. cars Stone unloaded	....
No. cars Gravel loaded	....
No. cars Gravel unloaded	....
No. cars Sand loaded	....
No. cars Sand unloaded	....
No. cars Cinders loaded, Foundry	*11*
No. cars Cinders unloaded	....
No. cars New Ties unloaded	....
No. cars Old Ties loaded	....
No. cars Old Rails loaded	....
No. cars Old Rails unloaded	....
No. cars Other Material loaded	....
No. cars Other Material unloaded	....
No. Days' Labor during week, not including Foreman	*43*

B. F. Taylor, **Foreman.**

Roman type printed form, italic type written by section foreman.

713 **Taylor's Exhibit No. "9"—Page 4.**

Form 940.

The Wabash Railroad Company.

Report of Material Used and Labor Performed on Section No. *1* for week ending *Jan. 31*, 1901.

Material Used.	Received.	Used.	On Hand.
Cross Ties, No. 1...	....	....	....
Cross Ties, No. 2...	....	*15*	*120*
Cross Ties, culls....	....	....	*425*
Switch Ties, No. sets	....	*1*	*1*
Feet of Crossing Plank	....	....	....
Fence Posts.....	....	....	....
Feet of Fence Boards	....	....	....
Fence Wire, No. spools	....	....	....
Frogs	....	....	*7*
Kegs of Spikes.....	....	*1*	*4*
Kegs of Bolts.....	....	*1*	*2*
Angle Bars.....	....	....	....
Old Splices.....	....	....	....
Nut Locks.....	....	....	*800*
New Steel Rail. No feet	....	....	....
Old Steel Rail, main track, No. feet....	....	....	....
Old Steel Rail, siding, No. feet....	.....	....	....
No. of Shims.....	....	....	....

Cross Ties Used.	No. 1.	No. 2.	Culls.
On mile *1* & *4*.			
6 Days Repairing track.			
3 Days Relaying track for Heinrich.			
On Sidings.....	....	....	....
Total	....	....	....

Labor Performed.	No.
No. Rails changed, main track.....	....
No. Rails changed, sidings.....	....
No. Rails broken, main track.....	....
No. Rails broken, sidings.....	....
Feet of Track ballasted, stone.....	....
Feet of Track ballasted, gravel....	....
Feet of Track ballasted, sand	....
Feet of Track ballasted, cinders...	....
Feet of Track surfaced, dirt.....	....
Feet of New Ditch	....
Feet of Ditch cleaned	....
Feet New Siding built.....	....
Feet Old Siding taken up.....	....
Feet of Fence built.....	....
Feet of Fence repaired.....	....
No. cars Stone loaded	....
No. cars Stone unloaded.....	....
No. cars Gravel loaded.....	....
No. cars Gravel unloaded.....	....
No. cars Sand loaded.....	....
No. cars Sand unloaded	....
No. cars Cinders loaded	....
No. cars Cinders unloaded.....	....
No. cars New Ties unloaded.....	....
No. cars Old Ties loaded.....	....
No. cars Old Rails loaded	....
No. cars Old Rails unloaded.....	....
No. cars Other Material loaded...	....
No. cars Other Material unloaded.	....
No. Days' Labor during week, not including Foreman.....	*62*

B. F. Taylor, **Foreman.**

Endorsed: "No. 79, Taylor, Jany, 1901."

Roman type printed form, italic type written by section foreman.

714 (Taylor's) Exhibit No. 10.

The Wabash Railroad Co.,

Office of General Roadmaster,

Western Division.

A. S. Haynes, General Road Master.

Moberly, Mo., Jan. 27, 1901.

Wm. Nietman:

Please note attached. Make bill for cost of labor as soon as work is completed and send to this office with return of attached.

A. S. HAYNES.

(Endorsement:)
No. 80
Replaced
tracks on trestle
Heinrich property,
St. Louis,
Nietmann.
January 1901.

715 (Taylor's) Exhibit No. 11.

Form 374.

The Wabash Railroad Company,

.....Department.

Ferguson, 1/30/1901.

Mr. A. S. Haynes, G. R. M.

Dear Sir: The track on Heinrich property where Interstate trestle was has been replaced. We need 100# new Spikes and 75# new bolts in laying the track.

Expenses of Labor is $26.40/

Yours,

WM. NIETMANN.

...SIFICATION OF LABOR.

...No. 1 for Month of MARCH 31, 1901

ACCOUNT.	No. of Days.	AMOUNT.	
...g Coal,			
Wood,			
Bridges,			
Buildings,			
Fences,			
Roadway and Track,	217	271	25
Telegraph, Foreman,	31	65	00
...g Freight,			
Passenger,			
...uards and Road Crossings,			
...s,			
...			
...co,			
...			

Division.

District.

190...

Amount Due.	
64	50
39	65
18	40
38	40
33	40
32	15
9	15

| | | |

717 **Taylor's Exhibit No. "13."**

Form 940.

The Wabash Railroad Company.

Report of Material Used and Labor Performed on Section No. *1* for week ending *March 31*, 1901.

Material Used.	Received.	Used.	On Hand.
Cross Ties, No. 1...	....	....	....
Cross Ties, No. 2...	....	*200*	*820*
Cross Ties, culls....	*750*	*87*	*2088*
Switch Ties, No. sets	*4*	*1*	*3*
Feet of Crossing Plank	....	....	....
Fence Posts.....	....	....	....
Feet of Fence Boards	....	....	....
Fence Wire, No. spools	....	....	....
Frogs	....	*1*	*17*
Kegs of Spikes.....	*4*	*3*	*3*
Kegs of Bolts.....	*1*	*1*	*2*
Angle Bars.....	....	....	....
Old Splices.....	....	....	....
Nut Locks	....	*200*	*300*
New Steel Rail. No. feet	....	....	....
Old Steel Rail, main track, No. feet....	....	....	....
Old Steel Rail, siding, No. feet.....	....	....	....
No. of Shims.....	....	....	....

Cross Ties Used.	No. 1.	No. 2.	Culls.
On mile *1 & 3*			
2 days tien and Repairing sid Tracks.			
6 days Graden and Laying New Side Track at Sarah St.			
On Sidings, *on mile 2*	....	....	*152*
Total	....	....	....

Labor Performed.	No.
No. Rails changed. main track.....	....
No. Rails changed, sidings.....	....
No. Rails broken, main track.....	....
No. Rails broken, sidings.....	....
Feet of Track ballasted, stone.....	....
Feet of Track ballasted, gravel....	....
Feet of Track ballasted, sand	....
Feet of Track ballasted, cinders...	....
Feet of Track surfaced, dirt.....	....
Feet of New Ditch	....
Feet of Ditch cleaned	....
Feet New Siding built.....	....
Feet Old Siding taken up.....	....
Feet of Fence built.....	....
Feet of Fence repaired.....	....
No. cars Stone loaded	....
No. cars Stone unloaded.....	....
No. cars Gravel loaded.....	....
No. cars Gravel unloaded.....	....
No. cars Sand loaded.....	....
No. cars Sand unloaded	....
No. cars Cinders loaded	....
No. cars Cinders unloaded.....	4
No. cars New Ties unloaded.....	3
No. cars Old Ties loaded.....	....
No. cars Old Rails loaded	....
No. cars Old Rails unloaded.....	1
No. cars Other Material loaded...	....
No. cars Other Material unloaded.	....
No. Days' Labor during week, not including Foreman.....	61

***B. F. Taylor*, Foreman.**

Endorsed: No. 82, B. F. Taylor, March 1901.

Roman type printed form, italic type written by section foreman.

719 **Taylor's Exhibit No. "15."**

Form 940.

The Wabash Railroad Company.

Report of Material Used and Labor Performed on Section No. *1* for week ending *June 30*, 1901.

Material Used.	Received.	Used.	On Hand.
Cross Ties, No. 1...	....	....	....
Cross Ties, No. 2...	....	*114*	*1530*
Cross Ties, culls....	....	*34*	*1927*
Switch Ties, No. sets	....	*1*	*4*
Feet of Crossing Plank, *4x10x16*...	*150*	....	....
Fence Posts.....	....	....	....
Feet of Fence Boards	....	....	....
Fence Wire, No. spools	....	....	....
Frogs	....	....	*21*
Kegs of Spikes.....	....	*2*	*1*
Kegs of Bolts.....	*2*	*1*	*2*
Angle Bars.....	....	....	....
Old Splices.....	....	....	....
Nut Locks.....	....	*200*	*600*
New Steel Rail. No. feet	....	....	....
Old Steel Rail, main track, No. feet....	....	....	....
Old Steel Rail, siding, No. feet.....	....	....	....
No. of Shims.....	....	....	....

Cross Ties Used.	No. 1.	No. 2.	Culls.
On Mile *1* & *4*.			
2 Days Repairing Track, Donk Bros.			
2 Days Repairing track, Logwood & DeCamp.			
3 Days General track Repairs.			
On Sidings.....	....	....	*34*
Total	....	....	....

Labor Performed.	No.
No. Rails changed, main track.....	....
No. Rails changed, sidings.....	....
No. Rails broken, main track.....	....
No. Rails broken, sidings.....	....
Feet of Track ballasted, stone.....	....
Feet of Track ballasted, gravel....	....
Feet of Track ballasted, sand	....
Feet of Track ballasted, cinders...	....
Feet of Track surfaced, dirt.....	....
Feet of New Ditch	....
Feet of Ditch cleaned	....
Feet New Siding built.....	....
Feet Old Siding taken up.....	....
Feet of Fence built.....	....
Feet of Fence repaired.....	....
No. cars Stone loaded	....
No. cars Stone unloaded.....	....
No. cars Gravel loaded.....	....
No. cars Gravel unloaded.....	....
No. cars Sand loaded.....	....
No. cars Sand unloaded	....
No. cars Cinders loaded	....
No. cars Cinders unloaded.....	5
No. cars New Ties unloaded.....	....
No. cars Old Ties loaded.....	....
No. cars Old Rails loaded	....
No. cars Old Rails unloaded.....	....
No. cars Other Material loaded...	....
No. cars Other Material unloaded.	....
No. Days' Labor during week, not including Foreman.....	47

B. F. Taylor, Foreman.

Endorsed: No. 86, B. F. Taylor, June, 1901.

Roman type printed form, italic type written by section foreman.

720 (Taylor's) Exhibit No. 16.

Form 341.

The Wabash Railroad Co.,

St. Louis Station, June 8, 1901.

Wm. Nietman, D. R. M.
Ferguson, Mo.

Material used on Repairing Donk Bros. track.

Used 16 No. 2 ties
20 lbs. Spikes.
Expense of Labor, Dollars, $3.55.

B. F. TAYLOR,
Foreman.

C. K.
W. Nietmann.

(Endorsement:)
No. 85
Donk Bros. Coal
track.

3.55

721 (Taylor's) Exhibit No. 17.

Form 374.

The Wabash Railroad Company.
..... Department.

Ferguson, 6/27/1901.

Mr. A. S. Haynes, G. R. M.

Dear Sir: Herewith Statement of Material used and cost of labor for repairing Donk Bros. Coal Co. switch at Vandeventer.

Material used, 1 new set switches;
42 new No. 2 ties, 25 rail braces.
100# new spikes & 4 cars cinder.
Cost of labor, $29.60.

Yours,
W. NIETMANN.

(Endorsement):
No. 87.
Repd.
Donk Bros. Coal Track.
June 27/1901.

722 Tait's Exhibit No. "1."

Statement of Side Tracks built between Eighteenth Street and Union Avenue, Showing Cost of Tracks, and how expenses were divided between Wabash and others:

Date.	Location.	Built for.		Labor & Mat'l.	Total Cost.
Jany. 1889	Compton Ave.	Consolidated Coal Co.	Labor...	$ 93.18	
			Ties.....	178.54	
			Rail.....	333.30	
			Fastngs..	91.50	$696.52
	Colorado charged 693/14947 of $93.18 or $4.32 covering labor only in bill No. 11660. Colorado not charged any proportion of the cost of material.				
Jany. 1895	Vandeventer Ave.	Heinrich Coal Co.	Labor...	$.....	
			Ties.....	216.50	
			Rail.....	335.88	
			Fastngs..	160.08	$712.46
	Colorado not charged any proportion.				
April 1895	Newstead Ave.	Sawyer & Austin Lbr. Co.	Labor...	$ 95.00	
			Ties.....	18.50	
			Rail.....	234.23	
			Fastngs..	117.60	$465.33
April 1895	Newstead Ave.	Sawyer & Austin Lbr. Co.	Labor...	$ 22.50	
			Ties.....	25.00	
			Rail.....	67.52	
			Fastngs..	5.02	$120.04
	Colorado not charged any proportion.				
April 1895.	Euclid Ave.	Holchen Coal Co.	Labor...	$ 50.50	
			Ties.....	119.50	
			Rail.....	121.51	
			Fastngs..	93.33	$384.84
	Colorado not charged any proportion.				

723 Date.	Location.	Built for.		Labor & Mat'l.	Total Cost.
Oct. 1895	Newstead Ave.	Reitz Cut Stone Co.	Labor...	$ 45.60	
			Ties.....	105.00	
			Rail.....	140.62	
			Fastngs..	124.42	$415.64
		Colorado charged 1665/8411 of $45.60 or $9.03. Covering labor only in bill of that month.			
Nov. 1895	Theresa Ave.	Heinrich Coal Co.	Labor...	$	
			Ties.....	9.00	
			Rail.....	199.00	
			Fastngs..	42.18	$250.18
		Colorado not charged any proportion.			
Nov. 1895.	Theresa Ave.	St. L. Hay Exchange	Labor...	$ 6.00	
			Ties.....	10.00	
			Rail.....	13.35	
			Fastngs..	2.90	$32.25
		Colorado charged 1472/7868 of $6.00 or $1.12 covering labor only. Colorado not charged any proportion of the cost of material.			
Dec. 1895	Theresa Ave.	Company North Coal Track.	Labor...	$.....	
			Ties.....	116.00	
			Rail.....	178.69	
			Fastngs..	97.69	$392.38
		Company South Coal Track.	Labor...	$.....	
			Ties....	155.00	
			Rail....	183.35	
			Fastngs..	95.64	$433.99
		Colorado not charged any proportion.			
Dec. 1895	Spring Ave.	Tamm Bros. Glue Co.	Labor...	$126.80	
			Ties.....	209.75	
			Rail.....	296.66	
			Fastngs..	202.11	$835.32
		Colorado not charged for labor or material.			

724

Date	Location.	Built for.		Labor & Mat'l.	Total Cost.
Jan. 1896.	Theresa Ave.	Scale track, St. L. Hay Exchange.	Labor...	$390.00	
			Ties.....	245.00	
			Rail.....	310.00	
			Fastngs..	229.35	$1,174.35
	Colorado not charged any proportion.				
July 1896	Manchester Road.	Logwood, Kurtzeborn & DeCamp.	Labor...	$ 75.70	
			Ties.....	138.20	
			Rail.....	190.00	
			Fastngs..	128.07	$531.97
	Colorado not charged any proportion.				
Nov. 1896	Theresa Ave.	St. L. Hay Exchange.	Labor....	$ 25.25	
			Ties.....	40.00	
			Rail.....	63.00	
			Fastngs..	11.74	$139.99
	Colorado charged 1168/7104 of $25.25. or $4.15 covering labor only.				
Nov. 1896	Theresa Ave.	Harrison-Berry Com. Co.	Labor...	$ 3.30	
			Ties.....	2.88	
			Rail.....	8.84	
			Fastngs..	1.71	$16.73
	Colorado charged 1168/7104 of $3.30 or 54c, covering labor only. Colorado not charged for material.				
July 1897	Manchester Road.	Madison Coal Co., No. 1.	Labor...	$200.00	
			Ties.....	165.20	
			Rail.....	266.25	
			Fastngs..	230.28	
July 1897	Manchester Road.	Madison Coal Co., No. 2.	Labor...	$150.90	
			Ties.....	163.66	
			Rail.....	260.00	
			Fastngs..	225.89	
July 1897	Manchester Road.	Madison Coal Co., No. 3.	Labor...	$384.86	
			Ties.....	42.50	
			Rail.....	80.00	
			Fastngs..	42.10	$2,211.64
	Colorado not charged any proportion.				

725

Date.	Location.	Built for.		Labor & Mat'l.	Total Cost.
Oct. 1897	Manchester Road.	Crabb, Klein Coal Co.	Labor	$ 60.25	
			Ties	127.50	
			Rail	140.00	
			Fastngs.	127.13	$454.88
	Colorado not charged any proportion.				
Nov. 1897	No record of new side track put in on joint track during November. Distribution of $36.50 to this account as shown by the Colorado Road in their statement, evidently an error.				
Dec. 1897	Ewing Ave.	Yard Track No. 8.	Labor	$ 71.25	
			Ties	110.58	
			Rail	180.00	
			Fastngs.	82.29	$444.12
	Colorado charged 580/6799 of $71.25 or $6.08 to cover labor, but this charge is offset by labor of sections 2 and 6 on joint track which was not charged. Total, $72.17—580/6799 of $72.17 or $6.15.				
Dec. 1897	Manchester Road.	Log-wood, Kurtzeborn & DeCamp.	Labor	$ 14.57	
			Ties	152.00	
			Rail	160.00	
			Fastngs.	193.83	$520.40
	Colorado not charged any proportion.				
June 1898	Newstead Ave.	Kinloch Telephone Co.	Labor	$ 95.00	
			Ties	109.50	
			Rail	110.00	
			Fastngs.	86.73	$401.23
	Colorado not charged any proportion.				
June 1898	Boyle Ave.	Gilsonite R. & P. Co.	Labor	$ 45.40	
			Ties	93.00	
			Rail	140.00	
			Fastngs.	126.49	$404.89
	Colorado not charged any proportion.				
July 1899	Vandeventer Ave.	Hein-rich Coal Co.	Labor	$ 39.70	
			Ties	78.50	
			Rail	117.37	
			Fastngs.	14.32	$249.89
	Colorado charged 1280/8679 of $39.70 or $5.85, which covers labor.				

726

Date.	Location.	Built for.		Labor. & Mat'l.	Total Cost.
Oct. 1899	Vandeventer Ave.	Heinrich Coal Co.	Labor	$ 17.00	
			Ties	23.50	
			Rail	75.94	
			Fastngs.	9.41	$125.85
	Colorado not charged any proportion.				
Oct. 1899	Vandeventer Ave.	Heinrich Coal Co.	Labor	$ 20.00	
			Ties	40.50	
			Rail	106.31	
			Fastngs.	11.82	$178.63
	Colorado not charged any proportion.				
Nov. 1899	Boyle Ave.	Gilsonite R. & P. Co.	Labor	$ 5.00	
			Ties	.....	
			Rail	30.38	
			Fastngs.	3.32	$38.70
	Colorado not charged any proportion.				
Dec. 1899	Boyle Ave.	Gilsonite R. & P. Co.	Labor	$ 3.00	
			Ties	.....	
			Rail	15.19	
			Fastngs.	1.49	$19.68
	Colorado charged 868/7964 of $3.00 or 32 cents for labor. Colorado not charged any proportion for material.				
Feb. 1900	Newstead Ave.	Ludlow Saylor Wire Co.	Labor	$ 54.85	
			Ties	164.50	
			Rail	227.60	
			Fastngs.	176.83	$623.78
	Colorado not charged any proportion				
July-Sept. 1900	Newstead Ave.	Polar Wave Ice Co., No. 1.	Labor	$ 67.70	
			Ties	86.50	
			Rail	342.44	
			Fastngs.	194.22	
July-Sept. 1900	Newstead Ave.	Polar Wave Ice Co., No. 2.	Labor	$ 53.50	
			Ties	57.00	
			Rail	242.19	
			Fastngs.	174.17	

727 Date.	Location.	Built for.		Labor & Mat'l.	Total Cost.
July-Sept. 1900	Newstead Ave.	Polar Wave Ice Co., No. 3.	Labor	$ 50.40	
			Ties	50.00	
			Rail	229.94	
			Fastngs.	185.97	$1,734.03
	Colorado charged 1271/8180 of $151.10 or $23.48 in July bill covering labor expended on these tracks. Balance of the labor $20.50 which was expended in September was not charged to joint account. Colorado not charged for material.				
Aug. 1900	Vandeventer Ave.	Heinrich Coal Co., No. 1.	Labor	$ 12.00	
			Ties	.....	
			Rail	62.29	
			Fastngs.	11.14	$85.43
Aug. 1900	Vandeventer Ave.	Heinrich Coal Co., No. 2.	Labor	$ 11.00	
			Ties	....	
			Rail	48.75	
			Fastngs.	9.15	$68.90
	Colorado not charged any proportion.				
Oct. 1900	Vandeventer Ave.	Heinrich Coal Co.	Labor	$ 25.25	
			Ties	4.70	
			Rail	94.00	
			Fastngs.	10.06	$134.01
	Colorado not charged any proportion.				
Nov. 1900	Spring Ave.	Tamm Bros. Glue Co.	Labor	$ 50.40	
			Ties	187.60	
			Rail	211.87	
			Fastngs.	86.78	$536.65
	Colorado not charged any proportion.				
Apr. 1901	Spring Ave.	Union Sand Co.	Labor	$ 72.50	
			Ties	102.30	
			Rail	290.00	
			Fastngs.	166.47	$631.27
	Colorado not charged any proportion of expense.				

728

Date.	Location.	Built for.		Labor & Mat'l.	Total Cost.
Apr. 1901	Sarah Street.	Empire Brewing Co.	Labor	$ 46.00	
			Ties	148.50	
			Rail	150.54	
			Fastngs.	115.81	$460.85

As to charge in March bill for labor laying new side tracks at Sarah Street, I find $110.21 charged to new side tracks on April Rolls of Sections 1 and 7, which was not charged to Joint Account.

Sept. 1901	Newstead Ave.	Polar Wave Ice Co.	Labor	$ 38.00	
			Ties	109.00	
			Rail	86.67	
			Fastngs.	96.04	$329.71

Cost of labor, ties and cinders. Material not charged to Colorado.

Dec. 1901	Vandeventer Ave.	Heinrich Coal Co., No. 1.	Labor	$ 6.80	
			Ties	.....	
			Rail	22.66	
			Fastngs.	3.55	
Dec. 1901	Vandeventer Ave.	Heinrich Coal Co., No. 2.	Labor	$ 9.95	
			Ties	.....	
			Rail	35.00	
			Fastngs.	5.04	$83.00

Colorado charged 1766/8931 of $16.75 or $3.31, covering labor charged in December.

TAIT'S EXHIBIT No. 2.

STATEMENT SHOWING CREDITS W
CITY & COLORADO R. R. CO
LOWED IN BILLS

MONTH	FEET	W P
1890.		
June	100	
July	100	
August	630	
September	700	
October	500	
October	260	
November	550	
November	160	
December	330	
1891.		
January	250	
February	260	
March	150	
April	230	
May	275	
June	940	
July	90	
August	700	
August	200	
September	700	
October	425	
December	600	
1892.		
January	198	
February	400	
1893.		
July	650	
TOTALS	9398	
Less Excess Credits allowed as per statement attached		

ENT SHOWING CREDITS WHICH SHOULD BE ALLOWED ST. LOUIS, KANSAS TY & COLORADO R. R. CO., ON ACCOUNT OF ERRORS IN CREDITS ALLOWED IN BILLS FOR RAIL TAKEN OUT OF TRACK.

	FEET	WEIGHT PER YARD	TONS	PRICE	AMOUNT	COLORADO PROPORTION	
						PER CENT.	AMOUNT
.....	100	70 lbs.	1.04	$22.50	$ 23.40	2000/19389	$ 2.41
.....	100	50 lbs.	.74	22.50	16.65	2302/19057	2.01
.....	630	50 lbs.	4.69	22.50	105.52	2207/19870	11.72
.....	700	50 lbs.	5.21	22.50	117.22	1990/16919	13.78
.....	500	52 lbs.	3.87	22.50	119.55	2088/19554	12.75
.....	260	60 lbs.	2.32	14.00			
.....	550	52 lbs.	4.25	22.50	120.24	1909/17205	13.34
.....	160	56 lbs.	1.33	14.00			
.....	330	56 lbs.	2.75	22.25	61.19	1929/16312	7.24
.....	250	50 lbs.	1.87	16.75	31.32	1552/14618	3.32
.....	260	50 lbs.	1.93	26.25	50.66	1435/13018	5.58
.....	150	60 lbs.	1.34	14.65	19.63	1424/14929	1.87
.....	230	52 lbs.	1.78	20.65	36.75	1512/14211	3.91
.....	275	56 lbs.	2.29	14.65	33.55	2441/14174	5.06
.....	940	52 lbs.	7.27	15.15	120.14	2366/14636	19.42
.....	90	52 lbs.	.70	14.65	10.25	2732/14649	1.91
.....	700	52 lbs.	5.41	20.90			
.....	200	50 lbs.	1.49	14.65	134.89	2766/15850	23.54
.....	700	50 lbs.	5.21	20.65	107.58	2262/16985	14.33
.....	425	54 lbs.	3.41	14.65	49.95	2261/17958	6.29
.....	600	56 lbs.	5.00	13.15	65.75	1660/19470	5.61
.....	198	52 lbs.	1.53	13.15	20.12	1052/19172	1.10
.....	400	56 lbs.	3.33	12.15	40.46	1112/17467	2.58
.....	650	52 lbs.	5.03	10.65	53.57	2120/17799	6.38
.....	9398		73.79		$1338,39		$164.15
wed as per state-							
.....			2.65		27.65		3.96
			71.14		$1310.74		$160.19

731 Tait's Exhibit No. "4."

Statement of Side Tracks Built between Eighteenth Street and Union Avenue.

(1) In January, 1889, The Wabash constructed a track west of Compton avenue, known as Consolidated Coal Co. Shown on Exhibit "D" as Maguire Coal Co.

Colorado charged 693-14947 of $93.15, or $4.32, for labor on this track, as shown by Wabash Bill No. 11660.

Side Track Report of Wabash R. R. shows following material used in constructing this track.

Cost, $696.52.

460 ft. 63 lb. rail,
1204 ft. 56 lb. rail (iron),
380 track ties,
1 set switch ties,
1 split switch,
1560 lb. splices,
1000 lb. spikes,
200 lb. bolts.

Material charged Colorado in month of January, 1889.

Wabash Bill No. 11660.

3080 ft. 63 lb. rail,
121 ft. 52 lb. rail (iron),
4 switch rods,
25 guard rail braces,
980 lb. splices,
200 lb. track spikes,
420 lb. track bolts,
CREDIT 3080 ft. 52 lb. rail,
" 121 ft. 52 lb. rail (iron).

(2) In January, 1895, the Wabash constructed a track at Vandeventer avenue, shown and marked on Exhibit "D" as Heinrich Coal Co., costing $712.46.

Side Track Report Shows.

2 sets switch ties,
233 No. 2 ties,
1 No. 7 frog,
1 No. 9 frog,
2 split switches,
2 switch stands,
800 lb. spikes,
200 lb. bolts,
240 nut locks,
1947 lb. splices,
13.975/2240 tons rail.

Wabash Bill No. 82505.

4 split switch points,
1 low switch stand,
400 lb. spikes,
100 lb. bolts,
8 switch rods,
2 conn. rods,
60 ft. 70 lb. rail (0.1400/2240 ton),
570 ft. 56 lb. rail (4.1680/2240 ton),
CREDIT 1040 lb. old frogs,
557 lb. wrot scrap,
" 60 ft. 70 lb. rail, 570 ft. 52 lb. rail.

732 (3) In April, 1895, the Wabash extended track known as Well Machine, cost $120.04, and constructed track known as Sawyer and Austin Lumber Co., cost $465.33, shown and marked on Exhibit "D" as Banner Lumber Co.

Side Track Report Shows.	Wabash Bill No. 87019.
87 No. 2 ties,	239 track ties,
1 No. 7 frog,	1-70 lb. switch point,
1 split switch,	1 high switch stand,
1 switch stand,	400 lbs. spikes,
900 lb. spikes,	200 nut locks,
294 nut locks,	200 lbs. bolts,
158 lb. bolts,	570 ft. 56 lb. 2nd hand steel (4.1680/2240 tons),
150 rail braces,	900 lbs. splices,
10.1067/2240 tons iron rail,	CREDITS. 260 lbs. sw. points,
1.1330/2240 tons steel rail,	1348 lbs. wrot scrap,
1596 lb. splices.	" 215 lbs. cast scrap,
	570 ft. 52 lb. old steel.

Sawyer & Austin furnished 1 set switch ties and 240 No. 2 ties.

(4) In April, 1895, the Wabash constructed a track known as Holchen Coal Co., at Euclid avenue, shown and marked on Exhibit "D" as New Union Sand Co., cost $384.84.

Side Track Report Shows.	Wabash Bill No. 87019.
1 set switch ties,	See Item No. 3.
139 No. 2 ties,	
1 No. 9 frog,	
1 switch stand,	
1 split switch,	
500 lbs. spikes,	
100 nut locks,	
50 lbs. bolts,	
2 cars cinders,	
3.1640/2240 tons iron rail,	
1.1960/2240 tons steel rail,	
792 lbs. splices.	

733 (5) In October, 1895, the Wabash constructed a track known as Reitz Cut Stone Co., on the north side of main track and west of Newstead avenue, cost $415.64.

Side Track Report Shows.	Wabash Bill No. 96035.
1 set switch ties,	550 cross ties,
110 cross ties,	1 low switch stand,
1 No. 7 frog,	4-70 lbs. switch points,
1 high switch stand,	1400 lbs. spikes,
1 split switch complete,	400 lbs. bolts,
250 lbs. spikes,	200 lbs. boat spikes,
100 lbs. bolts,	720 lbs. splices,
150 nut locks,	6½ tons 56 lb. rail, 780 ft.
80 rail braces,	CREDITS. 1040 lbs. sw. points,
1600 lbs. splices,	2150 lbs. wrot scrap,
5.1400/2240 tons rail.	" 150 lbs. cast scrap,
	780 ft. 52 lb. steel rail.

(6) In November, 1895, the Wabash extended track shown and marked on Exhibit "D" as Heinrich Coal Co., cost $250.18.

Side Track Report Shows.	Wabash Bill No. 97563.
18 No. 2 ties,	12 split switch rods,
600 lbs. spikes,	200 guard rail braces,
150 lbs. bolts,	1200 lbs. spikes,
150 nut locks,	400 lbs. bolts,
1882 lbs. splices,	2-70 lbs. switch points,
7.2150/2240 tons 70 lb. rail.	1 ground switch stand,
	1 high switch stand,
	750 ft. 56 lb. steel rail, 6¼ tons,
	CREDITS. 1135 lbs. wrot scrap,
	215 lbs. cast scrap,
	" 750 ft. 52 lb. old steel rail, 520 lbs. old steel rail.

734 (7) In November, 1895, the Wabash extended a track at Theresa avenue, shown and marked on Exhibit "D" as Hay Exchange Track, cost $32.25.

Side Track Report Shows.	Wabash Bill No. 97563.
20 No. 2 ties,	See Bill No. 97563 above.
50 lbs. spikes.	
8 lbs. bolts,	
16 nut locks,	
1495 lbs. iron rail,	
120 lbs. splices.	

(8) In December, 1895, the Wabash constructed two tracks at Theresa avenue, shown and marked on Exhibit "D" as Maguire Coal Co., being shown in records of the Wabash Company as "Company North Coal Track," and "Company South Coal Track."

Labor and material charged to St. L. & S. F. R. R. Co.

(9) In December, 1895, the Wabash constructed a track shown and marked on Exhibit "D" as Tamm Bros. Glue Co., south of the main line and west of Spring avenue, cost $835.32.

Side Track Report Shows.	Wabash Bill No. 99368.
388 No. 2 ties,	125 cross ties,
7 timbers,	300 lbs. spikes,
1 railroad crossing,	200 lbs. bolts,
800 lbs. spikes,	2-70 lbs. switch points,
200 lbs. bolts,	1 low switch stand,
256 nut locks,	3 switch rods,
640 lbs. new splices,	300 ft. 70 lb. steel (3.280/2240 tons),
1688 lbs. old splices,	400 ft. 56 lb. steel (3.747/2240 tons),
9.821/2240 tons 56 lb. rail,	CREDITS. 150 lbs. cast scrap,
2.1120/2240 tons 70 lb. rail.	572 lbs. wrot scrap,
	" 520 lbs. old frogs,
	700 ft. 55 lb. steel.

735 (10) In January, 1896, the Wabash changed tracks, shown and marked on Exhibit "D" as Hay Exchange Tracks, to accommodate the St. L. & S. F. R. R. Co.

Labor and material charged to the St. L. & S. F. R. R. Co.

(11) In July, 1896, the Wabash constructed a track known as Logwood, Kurtzborn & DeCamp, at Manchester road, shown and marked on Exhibit "D" as Logwood-DeCamp & Co., cost $531.97.

Colorado not charged for labor.

Side Track Report Shows.
1 set switch ties,
250 cull ties,
1 No. 7 frog,
1 split switch complete,
1 low switch stand,
600 lbs. spikes,
200 lbs. bolts,
234 nut locks,
8 cars cinders,
1704 lbs. splices,
9½ tons rail.

Wabash Bill No. 9979.
1 set switch ties,
60 No. 2 cross ties,
4 No. 1 switch rods,
2-70 lbs. switch points,
800 lbs. spikes,
200 lbs. bolts,
320 ft. 56 lb. 2nd hand steel rail,
CREDITS. 520 lbs. switch points, 900 lbs. wrot scrap,
" 320 ft, 52 lb. old rail.

(12) In November, 1896, the Wabash extended tracks shown and marked on Exhibit "D" as Hay Exchange Tracks, at cost of $139.99.

Side Track Report Shows.
100 No. 2 ties,
205 lbs. spikes,
38 lbs. bolts,
768 lbs. splices,
3½ tons 56 lb. rail.

Wabash Bill No. 15647.
100 No. 2 ties,
800 lbs. spikes,
200 lbs. bolts,
90 ft. 70 lb. rail (2100 lbs),
250 ft. 56 lb. rail (2.187/2240 tons),
2-70 lbs. switch points,
300 nut locks,
60 frog bolts,
300 nut locks,
CREDITS. 1025 lbs. wrot scrap, 250 ft. 56 lb. rail,
" 90 ft. 70 lb. rail, 500 lbs. old rail.

736 (13) In November, 1896, the Wabash extended a track known as Harrison-Berry Commission Co. track, shown and marked on Exhibit "D" as Hay Exchange Tracks, cost $16.73. Colorado charged for labor.

Side Track Report Shows.	See Bill No. 15647 above.
8 cull ties,	
17 lbs. spikes,	
12 lbs. bolts,	
½ ton 56 lb. rail,	
120 lbs. splices.	
Wabash Bill No. 15647.	

(14) In July, 1897, the Wabash constructed two tracks and extended one track, shown and marked on Exhibit "D" as Madison Coal Co., cost $2,211.64.

No charge to Colorado for labor or material.

(15) In October, 1897, the Wabash constructed a track at Manchester road, shown and marked on Exhibit "D" as Logwood-DeCamp & Co., cost $454.88.

Side Track Report Shows.	Wabash Bill No.
1 set switch ties,	Wabash bill missing.
155 No. 2 ties,	
1 No. 7 frog,	
1 split switch complete,	
1 ground switch stand,	
500 lbs. spikes,	
150 lbs. bolts,	
78 braces,	
6 cars cinders,	
150 nut locks,	
1800 lbs. splices,	
7 tons rail.	

(16) In December, 1897, the Wabash extended a track at Ewing avenue, known as Yard Track No. 8, at a cost of $444.12, and also constructed a track known as Logwood, Kurtz-
737 born & DeCamp, at Manchester road, shown and marked on Exhibit "D" as Logwood & DeCamp, at a cost of $520.40.

Side Track Report Shows.	Wabash Bill No.
2 sets switch ties,	3 sets switch ties,
462 cross ties,	150 cross ties,
2 No. 7 frogs,	3 No. 6 frogs,
2 split switches,	3-70 lbs. split switches, complete,
2 low switch stands,	
12 braces,	40 braces,
1600 lbs. spikes,	600 lbs. spikes,
320 lbs. bolts,	400 lbs. bolts,
336 nut locks,	9.840/2240 tons 70 lb. rail (900 ft.),
1 bumping post,	
17 tons rail,	CREDITS. 750 lbs. frog scrap,
3234 lbs. old splices.	600 lbs. cast scrap.
	" 1100 lbs. wrot scrap,
	9.840/2240 tons 70 lb. rail.

Colorado charged for labor on Ewing avenue yard track No. 8, 580-6799, of $71.25, or $6.08, but $72.17 for labor of sections 2 and 6 on joint track was not charged, 580-6799, of $72.17, or $6.15.

(17) In June, 1898, the Wabash constructed a track on the north side and east of Taylor avenue, known as Kinloch Telephone Co., shown and marked on Exhibit "D" as Polar Wave, cost $401.23.

Colorado not charged for labor or material.

(18) In June, 1898, the Wabash constructed a track known as Gilsonite R. & P. Co., and shown and marked on Exhibit "D" as Scruggs-McClure Coal Co., cost $404.89.

Colorado not charged for labor or material.

(19) In July, 1899, the Wabash extended a track shown and marked on Exhibit "D" as Heinrich Coal Co., cost $249.89.

738 Colorado charged 1280-8679 of $39.70, or $5.85, which covers labor.

Side Track Report Shows.	Wabash Bill No. 70877.
157 No. 2 ties,	454 No. 2 ties,
400 lbs. spikes,	600 lbs. spikes,
66 lbs. bolts,	1 second hand low switch stand,
660 lbs. splices,	1-70 lb. switch point, old,
5.1946/2240 tons rail.	1400 tie plates.

(20) In October, 1899, the Wabash extended two tracks shown and marked on Exhibit "D" as Heinrich Coal Co Tracks. Cost $125.85 and $178.63.

Side Track Report Shows.	Wabash Bill No. 75488.
128 No. 2 ties,	186 No. 2 ties,
400 lbs. spikes,	1600 lbs. spikes,
69 lbs. bolts,	600 lbs bolts,
92 nut locks,	1000 lbs. nut locks,
720 lbs. splices,	1 No. 6 frog,
6.1680/2240 tons rail.	2 No. 9 frogs,
	3 No. 7 frogs,
	2 low switch stands,
	2 pony switch stands,
	2.420/2240 tons 70 lb. rail
	4 sets frog bolts.

(21) In November, 1899, the Wabash extended a trac known as Gilsonite R. & P. Co., shown and marked on Exhibit "D" as Scruggs-McClure Coal Co., cost $38.70.
Colorado not charged for labor or material.

(22) In December, 1899, the Wabash extended a track know as Gilsonite R. & P. Co., shown and marked on Exhibit "D as Scruggs-McClure Coal Co., cost $19.68.
Colorado charged 868-7964 of $3.00, or 32 cents, for labo
Material not charged.

739 (23) In February, 1900, the Wabash constructed track, shown and marked on Exhibit "D" as Ludlow Saylor Wire Co. Cost $623.78.
Colorado not charged for labor.

Side Track Report Shows.	Wabash Bill No. 82594.
1 set switch ties,	2-70 lb. switch points,
229 No. 2 ties,	2 ground switch stands,
1-70 lb. split switch,	1 center connection stand
1 No. 9 frog,	400 lbs. track spikes,
1 high switch stand,	400 lbs, track bolts,
600 lbs. spikes,	500 nut locks,
100 nut locks,	450 ft. 70 lb. steel rail,
100 lbs. bolts,	4.1540/2240 tons.
6 cars cinders,	CREDITS. 300 lbs. cast scra
2520 lbs. splices,	" 3.2180/2240 to
9.233/2240 tons 2nd qua. rail.	rail.

(24) In July, 1900, the Wabash constructed two tracks north of main track and west of Newstead avenue, shown and marked, on Exhibit "D" as Polar Wave. Cost $1,217.72.
Colorado charged 1271-8180 of $151.10, or $23.48, for labor No material charged.

(25) In September, 1900, the Wabash constructed a track north of main track and west of Newstead avenue, shown and marked on Exhibit "D" as Polar Wave. Cost $516.31.
Colorado not charged for labor or material.

(26) In August, 1900, the Wabash extended two tracks at Vandeventer avenue, shown and marked on Exhibit "D" as Heinrich Coal Co. Cost $154.33.
Colorado not charged for labor or material.

(27) In October, 1900, the Wabash extended a track at Vandeventer avenue, shown and marked on Exhibit "D" as Heinrich Coal Co. Cost $134.01.
Colorado not charged for labor or material.

740 (28) In November, 1900, the Wabash constructed a track, shown and marked on Exhibit "D" as Tamm Bros. Glue Co. Cost $536.65.

Side Track Report Shows.	Wabash Bill No.
1 set switch ties,	302 No. 2 ties,
221 No. 2 ties,	600 lbs. track splices,
1 No. 7 63 lb. frog,	200 lbs. track bolts,
700 lbs. spikes,	
123 lbs. bolts,	
162 nut locks,	
1 low switch stand,	
1-63 lb. split switch complete,	
12 braces,	
1148 lbs. splices,	
8.1064/2240 tons rail.	

Colorado not charged for labor.

(29) In April, 1901, the Wabash constructed a track, shown and marked on Exhibit "D" as New Union Sand Co., west of Spring avenue. Cost $631.27.

Colorado not charged for labor.

Side Track Report Shows.	Wabash Bill No.
1 set switch ties,	
86 No. 2 ties,	
1-70 lb. split switch,	
1-70 lb. frog,	
1 low switch stand,	
1800 lbs. spikes,	
225 nut locks,	
200 lbs. bolts,	
3 cars cinders,	
1 switch point,	
1 switch rod,	
130 braces,	
1 ground stand,	
1832 lbs. splices,	
14½ tons rail.	

(30) In September, 1901, the Wabash extended a track west of Newstead avenue, shown and marked on Exhibit "D" as Polar Wave. Cost $329.71.

741 Colorado not charged for labor or material.

(31) In December, 1901, the Wabash extended two tracks at Vandeventer avenue, shown and marked on Exhibit "D" as Heinrich Coal Co. Cost $83.00.

Colorado charged 1766-8931 of $16.75, or $3.31, for labor. Not charged for material.

December bill missing.

Tait's Exhibit No. "5."

1.

Memorandum.

Kelso's Report, Form 940, May 21, 1889.

In May, 1889 J. P. Kelso's check roll shows:

Grading Blackmer & Post Track	$103.75
(Kauffman & Wilkinson) new side tracks	59.80

Kelso's Labor and Material Report for new side track just west of Cabanne avenue, to F. H. McGuigan, R. M., dated May 24, 1889.

J. S. McGuigan's Report Form 2488, dated May 10, 1889, shows material used and states this is private track, just west of Cabanne avenue, connected with main track, "don't know name, but it is called Lumber Co. track," and this Company did its own grading and furnished their own ties.

Total of Kelso's check roll for May, 1889.....$346.65

In May, 1889, Colorado pays it proportion of labor—bill amounting to $436.13.

Labor for Section 2 included in this. Detail Bills are missing.

742

2.

Memo.

J. P. Kelso's Check Roll for September, 1889, shows New Side Tracks.....$178.00

J. P. Kelso's Material Report for Sept. 1889.

J. P. Kelso's Report Form 940 for Sept. 14, 1889.

Kelso's Check Roll for September, 1889, shows total amount of labor..... 398.65

Total amount of bill rendered by Wabash and paid by Colorado Ry..... 380.09

Amount not chgd.....$ 18.56

3.

Report of J. P. Kelso to J. S. McGuigan, dated April 3, 1890, shows repairs to Hydraulic Press Brick Co. of $32.00.

J. S. McGuigan's letter to A. S. Haynes says: "Pls. not bill against Hy. Press Brick Co., for repairs on their work."

Total of Kelso's check roll for April, 1890.....$535.80

Wabash Bill (7293)..... 535.00

Rendered and paid by Colorado.

4.

J. P. Kelso's check roll for Section No. 1 for December, 1890, shows item of new side tracks $146.15

Total of Kelso's Dec. check roll.....$537.10

Total of bill rendered to Colorado..... 433.83 103.27

$ 42.88

743 Showing amount of $42.88 charged Colorado account new side tracks and included in bill of $433.83.

There is a supplemental roll and Kelso's material report for Nelse Morris switch at Theresa avenue, amounting to $103.27, not charged to Colorado.

5.

Statements attached to J. P. Kelso's check roll of May, 1891, show:

Repairs to M. C. P. & Co. switch	$ 7.47	
Repairs to Tamm switch	11.34	
Repairs to Car Wheel switch	11.04	$ 29.85

This $29.85 in included in bill rendered by Wabash Ry. and paid by Colorado for May, 1891, of $428.58.

Total amount of check roll		$462.35
Total amount of bill		428.58
		$ 33.57

Labor Berry Horn track not charged to Colorado.

See Kelso's Supplemental Roll for labor account Kelso and Elrod putting in Berry Horn switch.

6.

W. D. Elrod's X. Gang Check Roll for May, 1891, shows item of $67.90 for lifting sag east of Truesdale (this labor was not performed on Section No. 1 and should not be charged to joint account).

Total of Elrod's Check Roll	$507.90	
Total charged Colorado	482.26	$ 25.64
Total amount of Kelso's	$462.35	
Total amount of Elrod's	507.90	$970.25

744 Total amount of labor performed on Section 1 by Kelso and Elrod $902.35
Total charged Colorado 910.84

$ 8.49

7.

W. W. Woodin's check roll for August, 1893, shows:

Repairs to side tracks	$ 90.35	
Repairs to old sidings	22.41	
New side tracks	351.15	$463.91

W. W. Woodin's material report, dated August 24, 1893, for material used on Hoyt Metal and M. C. P. & C. Co. tracks, shows:

771 feet rail M. C. P. & Co
1390 feet rail Hoyt Metal...
Charged Colorado on bill... } Total 2161 feet

Total labor roll for August		$463.91
Not charged to Colorado		351.15
Amount charged Colorado		$112.76
As follows:		
!M. C. P. & Col. Co.	$ 32.82	
!Hoyt Metal	65.64	
*Hay Exchange	14.30	$112.76

745 J. Reagan's Check Roll, August, 1895, shows:

Repairs Berry Harrison Com. Co. Track	$ 40.48*	
Laying new track Xchange Elevator	44.65	
Roadway and track	117.17	
Cattle Grds. and Xngs	22.30	
X ties	22.30	
Frogs and switches	44.65	
Surfacing track	11.15	
Grass and weeds	22.30	$325.00
Total check roll	$325.00	
Total bill rendered	284.52	
	$ 40.48*	

Cost of laying new track for Xchange Elevator, $44.65, included in bill of $284.52, paid by Colorado.

9.

B. Taylor's Check Roll for July, 1900:

B. Taylor's Form 940, July 14, 1900.—New track at Newstead avenue.

B. Taylor's Form 940, July 21, 1900.—Shows 4 days putting in new track for Polar Wave.

B. Taylor's Form 940, July 31, 1900—Shows 5 days putting in tracks for Polar Wave.

Total amount of Check Roll	$355.00
Total amount of bill	355.00

New side track at Newstead avenue and labor putting in Polar Wave tracks included in bill of $355.00 rendered by Wabash R. R.

10.

746 B. Taylor's Check Roll for January, 1901.

B. Taylor's Form 940 shows 3 days relaying track for Heinrich. Wm. Nietmann's letter of January 30, 1901, to A. S. Haynes, G. R. M., shows amount $26.40.

Total of Check Roll	$328.75
Total bill rendered	328.75

Repairs to Heinrich tracks included in bill for $328.75.

11.

B. Taylor's Check Roll, March, 1901.

B. Taylor's Form 940, March 31, 1901, shows *new side track at Sarah street.

Total amount of Check Roll	$336.25
Total bill rendered	336.25

*Only side track at Sarah street is Empire Brewg. Co. track.

12.

B. Taylor's Check Roll, June, 1901,		$301.25
Taylor's letter June 8, 1901, to Wm. Nietmann, R. M., shows repairs to Donk Bros. track		3.55
Taylor's Form 940, June 30, 1901, shows two (2) days work at Donk Bros. and two (2) days work at Logwood Decamp.		
Neitmann's letter June 27, 1901, to A. S. Haynes, shows—		
Donk Bros., labor	$ 29.60	
Logwood De Camp	19.60	49.20
Total		$ 52.75

Repairs $52.75 included in bill of $301.25 rendered to Colorado Ry.

Total of check roll, $301.25.

747 Woreheide's Exhibit No. "1."

(Copy.)

January 9, 1900.

To the St. Louis, Kansas City & Colorado Railroad Company, and to John Scullin, Esq., President of said Company:

In view of the fact that the railroad and property of the St. Louis, Kansas City & Colorado Railroad Company was for a number of years in the hands of a receiver, appointed by the Circuit Court of the United States for the Eastern District of Missouri, Eastern Division, and in view of the further fact that said receiver was, by a recent order of said court, discharged, and directed to restore said railroad and property to the company owning the same, it is deemed proper to advise you, at this time, that under the decree of said Court, entered on or about December 31st, 1886, in a cause entitled:

"Central Trust Company of New York et al., Complainants, Nos. 2357 and 2464. vs. In Equity.
Wabash, St. Louis & Pacific Railway Company et al., Defendants.

Consolidated Cause.

The City of St. Louis and St. Louis, Kansas City & Colorado Railroad Company, Intervenors."

It was adjudged that the St. Louis, Kansas City & Colorado Railroad Company was entitled, on the conditions therein set forth, to the use of the right of way of the Wabash, St. Louis & Pacific Railway Company through said park, and to the use of the right of way of said Wabash Company, thirty feet in width, between said park and Eighteenth street in the City of St. Louis; and that
748 soon after the entry of said decree a temporary arrangement was entered into between the Wabash Western Railroad Company and the St. Louis, Kansas City & Colorado Railroad Company under which the Wabash Western Railroad Company (which latter company had, as assignee, succeeded to all the rights of the Wabash, St. Louis & Pacific Railway in the premises in question), whereby the Wabash Western Railroad Company did certain work and performed certain services (and its successor, the Wabash Railroad Company, has continued to do work and perform services) for the St. Louis, Kansas City & Colorado Railroad and its said receiver, in the operation of its road and in the handling of its engines, cars and traffic, when by the terms of said decree neither the Wabash Western Railroad Company nor its successor, the Wabash Railroad

Company, were required to do any work or perform any services for said St. Louis, Kansas City & Colorado Railroad Company. And, under said temporary agreement, the Wabash Western Railroad Company also permitted said St. Louis, Kansas City & Colorado Railroad Company to occupy and use certain of its real estate and the improvements and terminal facilities situated thereon, which were not within the right of way above described. And the Wabash Railroad Company, as assignee and successor of said Wabash Western Railroad Company, has also, under said temporary agreement, continued, up to the present time, to permit said St. Louis, Kansas City & Colorado Railroad Company, and its said receiver, to occupy and use certain real estate and the improvements and terminal facilities situated thereon, which were and are outside
749 of, and not within or upon said right of way, when by the terms of said decree, said St. Louis, Kansas City & Colorado Railroad Company, and its said receiver, were only entitled to use and occupy the right of way of said Wabash Railroad Company through said park, and said right of way thirty feet in width, between said Forest Park and Eighteenth street in the City of St. Louis, together with such tracks, side tracks, switches, turn-outs, turn-tables, and other terminal facilities as are situated on said right of way.

The object of this communication is to direct your attention to the evidence and proceedings in said cause and the terms of said decree, and inform the new management of your company and its Board of Directors, of the arrangement heretofore existing outside of said decree, and thereby prevent any misapprehension with respect to your rights in the premises.

It is not the intention, however, of the Wabash Railroad Company to take summary action, looking to the immediate termination of the existing arrangement, earlier than the end of January, 1900, which will give ample time for negotiation, and in case you desire to have the Wabash Railroad Company continue to render services not required of it under the decree, or furnish tracks or other terminal facilities outside said right of way, we shall be glad to take the matter up with you, and endeavor to agree upon the compensation to be paid by you to the Wabash Railroad Company for such additional services and facilities.

Very respectfully yours,
(Signed) JOSEPH RAMSEY, JR.,
Vice-President and General Manager
Wabash Railroad Company.

750 I, Fred Woreheide, being first duly sworn, upon my oath state that I did, on the 10th day of January, 1900, at the City of St. Louis, State of Missouri, deliver a true copy of the above and within letter, signed by Joseph Ramsey, Jr., Vice-President and General Manager of the Wabash Railroad Company, to John Scullin, he being one of the parties to whom said letter was addressed.

(Signed) FRED W. WOREHEIDE.

Sworn and subscribed to before me, a Notary Public within and for the City of St. Louis and State of Missouri, on this 12th day of January, A. D. 1900.

(Seal) (Signed) JOHN ELLSPERMANN.
Notary Public, City of St. Louis, Mo.

Term expires April 7, 1902.

753 And afterwards to-wit: on the 5th day of June, A. D. 1907, there was filed in said Circuit Court the Mandate of the United States Circuit Court of Appeals for the Eighth Circuit in said cause, which said Mandate is in words and figures, as follows, to-wit:

(Mandate of Court of Appeals, Eighth Circuit.)

United States of America—ss.

The President of the United States of America, to the Honorable the Judges of the Circuit Court of the United States for the Eastern District, of Missouri—Greeting:

(Seal)

Whereas, lately in the Circuit Court of the United States for the Eastern District of Missouri, before you, or some of you, in a cause between the Central Trust Company of New York, et al., complainants, and the Wabash, St. Louis and Pacific Railway Company, et al., defendants, and wherein the St. Louis, Kansas City and Colorado Railroad Company filed its intervening petition against the Wabash Railroad Company, et al., and wherein the decree of the said Circuit Court in said cause, entered on the 2nd day of April A. D. 1906, is in the following words, viz:

"This cause came on for final hearing this 2nd day of April, 1906, upon the motion and application of the St. Louis, Kansas City and Colorado Railroad Company. The parties appeared by counsel. The intervenor appeared by M. A. Low, W. F. Evans and Frank Hagerman, its Solicitors; and the Wabash Railroad Company appeared by Wells H. Blodgett, H.
754 S. Priest, C. N. Travous and J. L. Minnis, its Solicitors.

The cause was submitted upon the bound volume of testimony in this cause, entitled and designated "Pleadings and Evidence," and two plats marked "Chart A," and "Exhibit D," respectively and the court having heard the arguments of counsel, and being fully advised in the premises, orders, adjudges and decrees:

The decree of December 31st, 1886, set out in the intervenor's application and motion is in full force and effect, and is binding upon the St. Louis, Kansas City and Colorado Railroad Company, its successors and assigns, and upon the defendant, Wabash Railroad Company, its successors and assigns, and the said Wabash Railroad Company, its officers, agents and employes, are hereby enjoined to forthwith accord to the St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, upon the terms fixed in said decree, and subject to the regulations therein set forth, the equal right to use, with the

engines and cars (loaded or empty) of the latter, the right of way, tracks, switches, side-tracks turnouts, turntables and other terminal facilities of the Wabash Railroad Company in St. Louis, Missouri, between the north line of Forest Park and Eighteenth Street.

And it is further ordered, adjudged and decreed that the words, "tracks, switches, side-tracks, turnouts, turn-tables and other terminal facilities of the Wabash Railroad Company, in St. Louis, Missouri, between the north line of Forest Park and Eighteenth Street," as hereinbefore used, and as used in the original decree in this case correctly interpreted and
755 understood, mean only such tracks, switches, side-tracks, turnouts, turntables and terminal facilities as are or may be situate and located upon the strip of land forty-two (42) feet wide, commencing at the north line of Forest Park, where the railway of the Wabash Railroad Company enters said Park, thence along said strip, or right of way, on which the said railway is located, through said Park, and thence over a strip of land twenty-eight (28) or thirty (30) feet wide on which is located the said Railway, to said Eighteenth street, in the City of St. Louis, it being a continuous strip from the north line of Forest Park to said Eighteenth Street, and does not embrace any tracks of any kind not situate on said strip of land just described; and said Wabash Railroad Company, its officers, agents and employes are enjoined from refusing to permit such use, under the terms of said decree, and subject to the regulations therein set forth, by the said St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns; the right to the use by the said St. Louis, Kansas City and Colorado Railroad Company which the said Wabash Railroad Company is enjoined to forthwith accord, and is enjoined from refusing, is not limited to the ingress and egress of said St. Louis, Kansas City & Colorado Railroad Company with its trains and cars to and from the north line of Forest Park to Eighteenth Street in St. Louis, Missouri, but does include in all respects, subject to the terms of said decree, as hereinbefore interpreted, and subject to the regulations therein set forth, the right to the equal use and benefit, (with its engines, cars and trains,) of all the right of way, tracks, switches, side-tracks, turnouts, turn-tables and other terminal facilities which are or may be situ-
756 ate as hereinbefore defined, and the right to so use the said terminal facilities between the points aforesaid for all purposes that they are now used, or are susceptible of being used by the said Wabash Railroad Company under the said regulations provided for in said original decree.

It is further ordered, adjudged and decreed that the St. Louis, Kansas City and Colorado Railroad Company and the Wabash

Railroad Company each pay its own costs and expenses in this proceeding, to be herein taxed, and that execution issue therefor.

No appeal shall supersede the injunctive portion of this decree.

JOHN H. ROGERS,
U. S. District Judge.

as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals for the Eighth Circuit, by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears, And Whereas, in the present term of December, in the year of our Lord one thousand nine hundred and six, the said cause came on to be heard before the said United States Circuit [—] of Appeals, on the transcript of record from said Circuit Court, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court, in this cause, be, and the same is hereby, reversed with costs; and that the St. Louis, Kansas City and Colorado
757 Railroad Company have and recover against the Wabash Railroad Company, the sum of Three Hundred Eighty Two and 90/100 Dollars for its costs in this behalf expended and have execution therefor.

It is further ordered that this cause be and the same is hereby remanded to the said Circuit Court with directions to enter a decree not inconsistent with the views expressed in the opinion of this Court.

April 3, 1907.

United States Circuit Court of Appeals.

December Term, 1906. Eighth Circuit.

Costs of St. Louis, Kansas City and Colorado Railroad Company, Appellant in No. 2426.

December Term, 1905.

Filing record and docketing cause $5; filing 2 appearances at 25c, 50;	$ 5.50
Entering 2 appearances at 25c, 50; filing two receipts for record at 25c, 50;	1.00
2 papers at 25c, 50;	.50
Entering order, 20c; preparing record for printer, etc., $245.75; costs printing record, $90.00;	.20
	335.75

May Term, 1906.

Transfer $1; filing 2 appearances at 25c, 50; entering 2 appearances at 25c, 50c;	1.50
Entering 2 appearances at 25c, 50; filing 2 receipts for record at 25c, 50;	1.00
Filing 2 papers at 25c, 50;	.50

September Term, 1906.

Filing Briefs Appellant $5; filing briefs Appellee $5;	10.00

758 December Term, 1906.

Submission, 20c;	$ .20
Filing Opinion, 25c; decree $1; filing same, 25c; issuing mandate, $5;	6.50
Filing receipt for mandate, 25c; attorney's docket fee $20;	20.25
	$382.90

Attest:

JOHN D. JORDAN,
Clerk United States Circuit Court of Appeals for the Eighth Circuit.

Fee Book 5, Page 213.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable, Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the Third day of June in the year of our Lord one thousand nine hundred and seven.

Costs of Appellant.

Clerk,	$ 27.15
Printing Record,	335.75
Attorney,	20.00
	$382.90

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

759 And, afterwards, to-wit: on the 18th day of December, A. D. 1907, the following further proceedings were had and appear of record in said cause as follows, to-wit:

(Order permitting Amendment of Intervening Petition.)

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Central Trust Company, et al., Complainants,
2537 & 2464. vs.
Wabash, St. Louis & Pacific Railway Company, et al., Defendants,
St. Louis, Kansas City & Colorado Railroad Company Intervenor.

By consent of parties, it is

Ordered that said intervenor have leave to file its amendment to its intervening petition as this day presented, which is now accordingly done.

DAVID P. DYER, Judge.

December 18th, 1907.

760 Which said Amendment to the Intervening Petition is in words and figures, as follows, to- wit:

(Amendment to Intervening Petition.)

In the Circuit Court of the United States for the Eastern District of Missouri.

Central Trust Company, et al., Complainants,
Nos. 2357 and 2464 vs. In Equity.
Wabash, St. Louis & Pacific Railway Company, et al., Defendants.

Consolidated.

Amendment to Petition of St. Louis, Kansas City and Colorado Railroad Company.

Now comes petitioner, and by leave of court, presents this its Amended Petition, and thereupon it avers:

1. Under the original petition herein, after hearing the evidence, this court did, on April 2, 1906, enter a decree in words and figures as follows:

761 "In the Circuit Court of the United States for the Eastern District of Missouri.

Central Trust Company, et al., Complainants,
#2357 and 2464. vs.
Wabash, St. Louis & Pacific Railway Company, et al., Defendants.

In the matter of the interventing petition of the City of St. Louis, and St. Louis, Kansas City & Colorado Railroad Company.

Decree.

This cause came on for final hearing this 2nd day of April, 1906, upon the motion and application of the St. Louis, Kansas City and Colorado Railroad Company. The parties appeared by counsel. The intervenor appeared by M. A. Low, W. F. Evans and Frank Hagerman, its solicitors; and the Wabash Railroad Company appeared by Wells H. Blodgett, H. S. Priest, C. N. Travous and J. L. Minnis, its solicitors. The cause was submitted upon the bound volume of testimony in this cause, entitled and designated 'Pleadings and Evidence', and two plats marked "Chart A', and 'Exhibit D' respectively; and the court having heard the arguments of counsel, and being fully advised in the premises, orders, adjudges and decrees:

The decree of December 31, 1886, set out in the intervenor's application and motion, is in full force and effect, and
762 is binding upon the St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, and upon the defendant, Wabash Railroad Company, its successors and assigns, and the said Wabash Railroad Company, its officers, agents and employes, are hereby enjoined to forthwith accord to the St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, upon the terms fixed in said decree, and subject to the regulations therein set forth, the equal right to use, with the engines and cars (loaded or empty) of the latter, the right-of-way, tracks, switches, side-tracks, turnouts, turntables and other terminal facilities of the Wabash Railroad Company in St. Louis, Missouri, between the north line of Forest Park and Eighteenth Street.

And it is further ordered, adjudged and decreed that the words 'tracks, switches, side-tracks, turnouts, turntables and other terminal facilities of the Wabash Railroad Company in St. Louis, Missouri, between the north line of Forest Park and Eighteenth Street", as hereinbefore used, and as used in the original decree in this case, correctly interpreted and understood mean only such tracks, switches, side-tracks, turnouts, turn-tables and terminal facilities as are or may be situated and located upon the strip of land 42 feet wide, commencing at the north line of Forest Park, where the railway of the Wabash Railroad Company enters said Park; thence along said strip, or right of way, on which the said railway is located, through said park, and thence, over a strip of land 28 or 30 feet wide on which is located the said railway, to said Eighteenth street,
in the city of St. Louis, it being a continuous strip from
763 the north line of Forest Park to said Eighteenth street, and does not embrace any tracks of any kind not situate on said strip of land just described; and said Wabash Railroad Company, its officers, agents and employes are enjoined from

refusing to permit such use, under the terms of said decree, and subject to the regulations therein set forth, by the said St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, the right to the use by the said St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, which the said Wabash Railroad Company [in] enjoined to forthwith accord, and is enjoined from refusing is not limited to the ingress and egress of said St. Louis, Kansas City & Colorado Railroad Company with its trains, engines and cars to and from the north line of Forest Park to Eighteenth Street in St. Louis, Missouri, but does include in all respects, subject to the terms of said decree, as hereinbefore interpreted, and subject to the regulations therein set forth, the right to the equal use and benefits, with its engines, cars and trains, of all the right of way, tracks, switches, side-tracks, turnouts, turntables and other terminal facilities which are or may be situate as hereinbefore defined, and the right to so use the said terminal facilities between the points aforesaid for all purposes that they are now used, or are susceptible of being used by the said Wabash Railroad Company, under the said regulations provided for in said original decree.

It is further ordered, adjudged and decreed that the St. Louis, Kansas City & Colorado Railroad Company and the Wabash Railroad Company, each pay its own costs and
764 expenses in this proceeding, to be herein taxed, and that execution issue therefor.

No appeal shall supersede the injunctive portion of this decree.

JOHN H. ROGERS,
U. S. District Judge.

St. Louis, Mo., April 2nd, 1906."

2. From the said decree the petitioner prosecuted its appeal to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, which, after a hearing, reversed and remanded said cause with directions to enter a decree not inconsistent with the views of that court as expressed in its opinion. Copies of said opinion and the mandate of that court are hereto attached, marked Exhibit "1" and "2" respectively, and made part hereof. The Court, in that opinion, among other things, held that under the decree of December 31st, 1886, set forth in the original petition, petitioner was entitled to enjoy the joint and equal use of the entire strip of land between the north line of Forest Park and Eighteenth Street, in St. Louis, Missouri, which the Wabash, St. Louis & Pacific Railroad Company owned or had acquired the right to use when said decree was rendered, and all tracks, side-tracks, turn-outs, turn-tables and terminal facilities now thereon, but was not

entitled to the use under that decree of any of the property, industrial or railroad facilities of the Wabash Railroad Company beyond the limits of that strip.

3. Petitioner is entitled to all the relief for which it prayed in its original petition, and neither the Circuit Court of
765 Appeals nor this court has any right to exclude it from the use and benefit under the decree of December 31, 1886, of the property, industrial or railroad facilities of the Wabash Railroad Company beyond the limits of the strip mentioned, and any such construction of said original decree fails to give full faith and credit thereto, to which petitioner is entitled under and by virtue of the following provisions of the constitution of the United States; Section 8, Article 1, Section 1 and 2, of Article III, Section I of Article V, and Article VI.

4. Petitioner therefore shows that this case arises under the constitution of the United States, and it hereby invokes the jurisdiction of this court for the protection to which it is thereunder entitled, and asks that under said constitutional provisions full faith and credit be given to said decree of December 31st, 1886, and that it be accorded all the relief for which it originally prayed, including the right under said decree to the equal use and benefit of the property industrial or railroad facilities, from which said opinion of the Circuit Court of Appeals attempts to exclude it, and petitioner will ever pray, etc.

W. F. EVANS,
M. A. LOW,
FRANK HAGERMAN.
Solicitors for Petitioner.

United States of America,
Eastern District of Missouri—ss.

I, W. F. Evans, upon my oath say, that I am one of the Solicitors and the General Attorney of the St. Louis,
766 Kansas City and Colorado Railroad Company, the petitioner above named, and as such make, and am authorized to make, this affidavit; that I have read the foregoing amendment to the petition in the above-entitled cause, and am acquainted with the contents thereof, and that the matters and things therein stated are true. I further state that the said amendment is not made for the purpose of vexation or delay, and that the matter of the said amendment is material and could not, with reasonable diligence, have been sooner introduced in the bill or petition.

W. F. EVANS.

State of Missouri,
City of St. Louis—ss.

Subscribed and sworn to before me, a Notary Public within and for the city and state aforesaid, this 16th day of December, A. D. 1907. My commission expires November 22, 1911.

(Seal) KATE L. WORLEY,
Notary Public.

The receipt of a copy of the foregoing amendment is hereby acknowkledged this .....day of October, 1907, and we consent to the filing of the same without further notice.

WELLS H. BLODGETT & J. L. MINNIS.
Solicitors for Wabash Railroad Co.

767 "Exhibit I".

United States Circuit Court of Appeals, Eighth Circuit.

December Term, A. D. 1906.

The St. Louis, Kansas City and Colorado Company, Appellant,
No. 2426. vs.
Wabash Railroad Company and City of St. Louis, Appellees.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Mr. W. F. Evans and Mr. Frank Hagerman (Mr. E. S. Robert and Mr. M. A. Low were with them on the brief) for appellant.

Mr. J. L. Minnis (Mr. Wells H. Blodget, Mr. C. N. Travous and Mr. H. S. Priest were with him on brief) for appellee Wabash Railroad Company.

Before Sanborn, Hook and Adams, Circuit Judges.

Syllabus.

1. Railroads.—Right of Way.—Meaning.

The term, "right of way", when used to describe the real estate of a railroad company ordinarily signifies the entire strip of land which the corporation has found it necessary or convenient to acquire the right to use for railway pur-
768 poses, and it is not limited to the specific part thereof secured or used for its main track or other particular improvements.

2. Decree—Construction—Proof to Reasonable Certainty Requisite to Modify Ordinary Meaning and Effect.

When the terms of a decree are plain and free from ambiguity, their ordinary meaning and effect may not be lawfully extended or contracted by construction, in the absence of proof to a reasonable certainty that such was the purpose of the court, for the legal presumption is that the judge carefully expressed his deliberate intention therein.

3. Same—Intention to Make no Limitation Presumed from its Absence.

The absence from a decree of any limitation or exception to general terms of known significance raises a persuasive legal presumption that the court intended to make none.

4. Res Adjudicata—Every Matter Admissible in Former Suit on Same Cause Between Same Parties in Adjudicated.

In a second suit between the same parties on their privies upon the same cause of action not only every matter offered, but every admissible matter which might have been offered to sustain or defeat, in whole or in part, the cause of action, is rendered res adjudicata, by a former judgment upon the Merits.

769 5. Decree for Continuous Use—Enforcement Subject to Equities Subsequently Arising.

A court of equity may condition its decree for the enforcement of a former decree for the continuous use of a right of way or of terminal facilities by equitable terms, or may refuse to enforce it, where subsequent to the entry of the original decree such radical changes in the situation, rights, or relations of the parties have been wrought that equity demands such terms or forbids its enforcement.

But in the absence of such changes the original decree concludes the rights and remedies of the parties and it must be enforced.

6. Decree for Joint Use of Right of Way and Terminal Facilities — Interpretation — Enforcement — Facts — Conclusion.

In 1886 the Circuit Court rendered a decree that the Colorado Company should enjoy the joint and equal use of the "right of way, tracks, side tracks, switches, turnouts, turntables and other terminal facilities" of the Wabash company between the line of Forest Park and 18th street in the city of St. Louis, on reasonable terms fixed therein.

Held (1) this decree entitled the Colorado company to the joint use of the entire strip of land between the north line of

the park and 18th street which the Wabash company had acquired the right to use for railway purposes at the date of the decree and of all the tracks, side tracks, turnouts, turn-
770 tables and other terminal facilities thereon.

2. That decree was equitable and in the absence of proof of such a change of conditions since its entry as would render its enforcement unjust, the Colorado company is still entitled to the joint use of this entire strip and of all the tracks, side tracks, switches, turnouts, turntables, and other terminal facilities of the Wabash company which are now upon said strip.

3. But the Colorado company is not entitled under that decree to the use of the industrial tracks, land or other railway facilities of the Wabash company outside the limits of that strip, the use of which it had acquired at the date of the decree of 1886.

Sanborn, Circuit Judge, delivered the opinion of the court.

On December 31, 1886, upon a petition of intervention in the suit to foreclose the mortgages upon the Wabash, St. Louis & Pacific Railway Company, the court below rendered a decree to the effect that the St. Louis, Kansas City & Colorado Railway Company should have the joint use of the "right of way, tracks, switches, side tracks, turnouts, turntables and other terminal facilities of the Wabash Railway Company between the north line of Forest Park and Eighteenth Street in the city of St. Louis" and that for this use it should pay 6 per cent. per annum upon $500,000, one-half of the value of this property, and its proportion of the cost of its main-
771 tenance upon a wheelage basis. The Wabash company appealed from this decree and it was affirmed by the Supreme Court. Central Trust Co. v. Wabash, St. Louis & Pacific R. Co., 29 Fed. 546; Joy v. St. Louis, 138 U. S. 1.

Eighteenth street runs north and south. The Union Station is located upon the west side of this street. The east line of Forest Park is about three miles west of 18th street. At the time this decree was rendered the Wabash, St. Louis & Pacific Railway Company owned a strip of land which varied in width from 30 feet to more than 200 feet and which extended from 18th street to the east line of the park and it also had an easement for the passage of its trains and engines upon a strip of land 42 feet wide through the park from the east side to the north side thereof. It had constructed and was operating a main track, side tracks, switches and terminal facilities upon

this property. Under this decree the Colorado company entered upon, and continued in the joint use of this main track and some of the side tracks, switches and terminal facilities until 1902, when the Wabash Railroad Company, which had succeeded to the rights of the Wabash, St. Louis & Pacific Railway Company, limited its use to that necessary for the ingress and egress of its trains to and from the station over the main track and the side tracks requisite for their passage. Thereupon the Colorado company applied to the court for an order that the Wabash company be required to permit it to use all the terminal facilities of that company between the north line of the park and 18th street, including its tracks,
772 switches, turnouts, and turntables. Issue was joined, testimony was taken and after a final hearing the court adjudged that the Colorado company was entitled, under the terms of the original decree, to the joint use of the tracks and railway facilities of the Wabash company upon that strip of land upon which the main track of the Wabash company was laid 42 feet in width through the park and only 28 or 30 feet in width from the east line of the park to 18th street and to the use of none of the other terminal facilities of the latter company. Central Trust Co. v. Wabash, St. Louis & Pacific R. Co., 144 Fed. 576. This decree is challenged by the appeal. The Colorado company asserts, and the Wabash company denies that the "right of way" meant by the original decree was the entire strip then owned by the Wabash company between the east line of the park and 18th street, and the real question in this case is whether the joint use decreed to the Colorado company in 1886 extended to the entire strip and the railway facilities thereon or was limited to that portion thereof 28 to 30 feet wide upon which the main track had been built and to the improvements upon this narrower strip.

The parts of the decree pertinent to this issue read in this way:

"And the court doth further find, order adjudge and decree that the equities are with said intervenors and said intervenors are entitled to the relief as prayed for in their amended bill of complaint herein.
773 And the Court finds, adjudges and decrees that the basis of compensation to be paid by the intervenor, the St. Louis, Kansas City & Colorado Railroad Company, for the use of right of way and tracks, side tracks, switches, turnouts, turntables and other terminal facilities of said Wabash, St. Louis & Pacific Railway Company at and between the north line of Forest Park and Eighteenth street in the city of St. Louis, shall be the value of said right of way, tracks and other property last described as determined by the Mas-

ter in his said reports; and the compensation to be paid shall be per annum, six per cent. on one-half of the value of said right of way, tracks, side tracks, switches, turnouts, turntables and other terminal facilities, and the said one-half value is and shall be taken to be five hundred thousand dollars. * * * And the court doth further order, adjudge and decree that the running of all trains, engines or cars of said intervenor, the said St. Louis, Kansas City & Colorado Railroad Company, over said right of way, and tracks and the use of said right of way, road, terminal facilities and other property specified as aforesaid, shall conform to the rules and regulations now in force and such other reasonable rules and regulations as may hereafter be adopted. * * * And the court doth further order, adjudge and decree that in all respects subject to the terms of this decree the said railroad company, intervenor, shall enjoy the equal use and benefit of said right of way, tracks, switches, side tracks, turnouts, turntables and other terminal facilities with said Wabash, St. Louis & Pacific Railway Company, or its said receivers, and the said Wabash, St. Louis & Pacific Railway Company.
774 * * * and all persons claiming by, through, or under them * * * are hereby perpetually enjoined and restrained from in any manner refusing to permit the said intervenor * * * from using with it for their engines and cars (loaded or empty) the said right of way, tracks, switches, side tracks, turnouts, turntables and other terminal facilities of said Wabash, St. Louis, & Pacific Railway Company between the north line of said Forest Park and said Eighteenth street * * * And the said intervenor, the St. Louis, Kansas City & Colorado Railroad Company, by its officers, agents and employes and each of them, is hereby authorized and permitted with its right of way, road, tracks, and property, engines and cars, loaded or empty, to make connection with said Wabash, St. Louis & Pacific Railway Company at the north line of said Forest Park and to use the said right of way, tracks, switches, side tracks, turnouts, turntables, and other terminal facilities of said Wabash, St. Louis & Pacific Railway Company, or any of claiming by, through or under it as to the same, between the north line of said park and Eighteenth street, on the terms, in the manner and subject to the regulations in this decree set forth in and for the transaction of the business and in the operation of the road of said St. Louis, Kansas City & Colorado Railroad Company, its successors or assigns."

The ordinary signification of the term "right of way" when used to describe land which a railroad corporation owns or is entitled to use for railroad purposes is the entire strip or tract it owns or is entitled to use for this purpose and not

any specific or limited part thereof upon which its main track or other specified improvements are located. Joy v. St. 775 Louis, 138 U. S. 1, 44, 45, 46; Territory of New Mexico v. United States Trust Co., 172 U. S. 171, 181-2; 174 U. S. 545, 546; Chicago & Alton R. Co. v. People, 98 Ill., 350, 356-7; Lake Erie & W. R. Co. v. Middlecoff, 150 Ill. 27, 37 M. E. 660, 663; Pfaff v. Terre Haute & I. R. Co., 108 Ind. 144, 148, 9 N. E. 93, 95.

To one ignorant of the origin and history of the rights of the contending parties and unaware of the persuasive arguments of counsel the reading of this decree would suggest no doubt that it granted the joint use of the entire strip owned by the Wabash Company and of all the railroad facilities thereon between the east line of the park and 18th street Upon its face there is no ambiguity in its terms. They suggest no limitation or exception, and when the terms of a decree are plain and clear their ordinary meaning and effect may not be lawfully contracted or extended unless it appears with reasonable certainty that such was the purpose of the court, for the legal presumption is that the judge carefully and thoughtfully expressed therein his deliberate intention. The Wabash Company, therefore assumed no light burden when it essayed to prove that the court intended by this decree to grant to the Colorado Company the joint use of a strip only 30 feet in width out of the wider strip the Wabash Company owned between the east line of the park and 18th street. Its contention in this respect is based upon the pleadings and proceedings in the intervention and upon the earlier relations of the parties and their predecessors in interest, and a brief statement of some of the salient facts which condition it is essential to its understanding, but reference is made to the opinion of 776 Mr. Justice Brewer who rendered the original decree, in 29 Fed. 546, and to the opinion of the Supreme Court in Joy v. St. Louis, 138 U. S. 1, for a detailed statement of the origin and history of the rights and litigation of these parties.

On August 11, 1875, the St. Louis County Railroad Company owned the title of or the easement to use about twelve isolated strips of land which varied in width and which now constitute parts of the entire strip of the Wabash Company east of the park and it claimed a right of way through the park. It had laid out, and it intended to build over these tracts a railroad from the north line of the park to 18th street. The St. Louis, Kansas City & Northern Railway Company, the predecessor in interest of the Wabash Company, was operating its railroad and was anxious to extend it through the park to the Union Station along this line. Thereupon, on this 11th

day of August, 1875, and as a part of the same transaction, these corporations made an agreement, the county company made a deed, and the two companies and the commissioners of Forest Park made a tripartite agreement whereby the county company agreed to, and did convey to the Kansas City company a strip 28 feet in width through each of its tracts between the east line of the park and Grand avenue, a strip 30 feet in width through each of its tracts between Grand Avenue and 18th street, and an undivided half of its right of way through the park, the park commissioners assured to the county company a right of way through the park 42 feet in width, the county company covenanted by the ninth paragraph of the tripartite agreement to "permit under such
777 reasonable regulations and terms as may be agreed upon other railroads to use its right of way through the park and up to the terminus of its road in the city of St. Louis upon such terms and for such fair and equitable compensation to be paid therefor as may be agreed upon by such companies" and the Kansas City company, as was subsequently held in 138 U. S. 1, accepted its right of way through the park subject to the condition in the 9th paragraph of the tripartite agreement that this right of way and also the right of way it might acquire east of the park to 18th street might be used by other railroads.

It is important to note and bear in mind the times when and the sources from which the Kansas City company and its successor, the Wabash company, acquired the title to the entire strip east of the park which it owned when the decree of 1886 was rendered and upon which it had then constructed and was operating its railroad. The isolated tracts owned by the county company in 1875 extended over less than one-half the distance between the park and 18th street. The Wabash company derived its title to strips 28 or 30 feet in width through those tracts under the county company's deed of August 11, 1875. It secured the remainder of them under a deed to the Kansas City company made in 1878. It acquired tracts between these isolated lands from third parties by purchase and condemnation and these tracts were of varying width and covered more than one-half of the length of the entire strip. Thus this strip was made up (1) of strips acquired in 1875 28 or 30 feet in width through the isolated tracts then owned by the county company which covered less than half of its
778 length (2) of the remainder of these isolated tracts deeded to the Kansas City company in 1878, and (3) of the tracts of land of varying width between these isolated tracts.

The court below seems to have over looked this fact, for it states as one of the controlling reasons for its conclusion that the right of way of the decree was only 28 or 30 feet in width east of the park, that "at the time the original decree was rendered the Wabash, St. Louis & Pacific Railway Company owned a right of way through Forest Park 42 feet wide, and a right of way 28 or 30 feet wide from Forest Park to the Union depot at Eighteenth street in St. Louis, Mo. It derived all this right of way through an instrument of writing spoken of in all this litigation as the 'tripartite agreement.' That this last statement is true is distinctly shown by the language of the Supreme Court of the United States in 138 U. S. at page 43, 11 Sup. Ct. at page 255, 34 L Ed. 843, in these words: 'The tripartite agreement is the only muniment of title under which the appellants now enjoy the right of way!" The facts were, however, that at the time of the original decree the Wabash company not only had a right of way 28 or 30 feet in width east of the park, but a wider one, that it neither derived all of this right of way nor all of the alleged right of way 28 or 30 feet in width from the tripartite agreement, but it derived the former from the three sources which have been specified, a portion of the latter from the deed of the county company of August 11, 1875, the agreement of the two corporations of that date and the tripartite agreement, but the larger portion from third parties
779 by subsequent purchase and condemnation of the lands between the isolated tracts owned by the county company at that time, and that the tripartite agreement conveyed no title to, but imposed a condition upon the use of the Wabash company's right of way and property east of the park. The statement of the Supreme Court that "the tripartite agreement is the only muniment of title under which the appellants now enjoy the right of way" was true only because it was their only muniment of title to that portion of the right of way through the park. The park commissioners never had any title to any of the property east of the park and they could have granted none. They claimed to have, and by the tripartite agreement they granted the right of way through the park upon the condition that their immediate and remote grantees would permit its use and the use of their right of way east of the park to 18th street by other railroads which might desire to enter the city over it. But the muniments of their title to the property east of the park were their deeds from former owners, and the tripartite agreement, instead of being a muniment of title to it, was an incumbrance upon it. Joy v. St. Louis, 138 U. S. 39, 40, 41, 42.

In 1886 the Colorado company filed its intervening petition and its amended petition, alleged that it was one of the "other

railroads" which the county company by the ninth paragraph of the tripartite agreement covenanted to permit to use its right of way through the park and up to the terminus of its railroad in the city of St. Louis, that the Wabash held its right of way from the north line of the park to 18th street subject to the condition expressed in that covenant, and prayed that the petitioner might enjoy the joint and equal use of it. The
780 Wabash company answered, among other things, that the alleged covenant and condition attached to those portions of the isolated tracts owned by the county company in 1875, which it still held after it had conveyed the 28 or 30 feet strips to the Kansas City company, and that those strips and the intermediate tracts which it had obtained by purchase and condemnation from third parties were exempt from them. But the court held otherwise and rendered the decree that the Colorado company should "enjoy the equal use and benefit of the right of way and the tracks, side tracks and switches, turnouts, turntables and other terminal facilities of the Wabash company between the north line of Forest Park and Eighteenth street." A sufficient statement of the origin and history of the rights of the parties and of the previous litigation has now been made to enable us to consider intelligently the reasons urged by counsel for the Wabash Company why this decree should be construed to mean the right of way of the Wabash company through the park; its right of way only 28 or 30 feet in width east of the park and its railway facilities thereon.

Their first contention is that the description in the decree of the right of way and railway facilities between the north line of the park and 18th street must be interpreted to mean "that strip of land which railways take upon which to construct their road-bed" and hence that on which the Wabash company had constructed its road-bed in 1886, because in the absence of that construction no land or property of the Wabash company could be found between the north line of the park and 18th street for the reason that the two lines run at right an-
781 gles. But this argument just as conclusively demonstrates that the right of way of the decree must be interpreted to have its ordinary signification, the entire strip which the Wabash company owned or had acquired the right to use for railroad purposes between the north line of the park and 18th street and the tracks and railway facilities thereon, and it fails to advance the investigation.

The second argument is that the right of way east of the park specified in the decree is limited by the prayer of the amended bill and this sentence in the decree: "And the court doth further find, order, adjudge and decree that the equities

are with the intervenors and said intervenors are entitled to the relief as prayed for in the amended bill." The prayer of the amended bill was that the Wabash Company be enjoined from preventing the Colorado Company, "from using said right of way of said Wabash, St. Louis & Pacific Railway Company" between the north line of the park and 18th street "including the tracks of said Wabash, St. Louis & Pacific Railway Company between" those lines and for general relief. A careful search of this bill has disclosed nothing which limits "said right of way" mentioned in the prayer to 28 or 30 feet in width but has brought to light a very clear indication that this right of way was wider and that its width was not indicated otherwise than by the ownership of the Wabash Company. The intervenors allege in this bill that on August 11, 1875, the St. Louis County Company had acquired a right of way 42 feet in width through the park and was the owner of a large part of such right of way east of the park, that it agreed on
782 that day to convey the joint use of its right of way through said park and a strip 30 feet wide off the south side of its right of way east of the park to the Kansas City Company, that by the tripartite agreement its right of way through the park 42 feet in width was assured to it on condition that it should permit other railroads to use its right of way through the park and up to the terminus of its road in St. Louis, that on December 24, 1878, the Kansas City Company became the owner of all the remainder of the County Company's right of way and property between the park and 18th street and that in 1879 the Wabash Company succeeded to the Kansas City Company and since that date "has used, enjoyed, owned and operated all the property formerly owned by said St. Louis, Kansas City & Northern Railway including the railroad and right of way from said Union avenue to Eighteenth street." These averments demonstrated that "said right of way" of the Wabash Company east of the park for the joint use of which the Colorado Company prayed was more than 30 feet in width, because they assert that the County Company owned parts of it in 1875, that it agreed to convey 30 feet in width off the south side of these parts on August 11th in that year, that the Kansas City Company acquired the remainder of them in 1878 and that the Wabash Company owned and operated all of them in 1886. The right of way east of the park described in the decree was not, therefore, limited to 30 feet in width by its reference to the amended bill or its prayer (1) because these contain no such limitation but describe a wider right of way and (2) because the subsequent terms of the decree which proceed to grant specifically the relief
783 prayed in the bill, which constitute the most cogent evidence of the intention of the court, contain no such limitation.

It is next said that the stipulation, testimony and opinions in the intervention limit the width of the right of way of the decree east of the park to 30 feet. In support of this contention attention is called to a stipulation in that proceeding to the effect that the propery conveyed by the deed of August 11, 1875, was marked in blue on the chart A and was 30 feet in width as a rule. But this admission fails to indicate that the right of way of the Wabash Company in 1886, parts of which had been derived from two other sources, was not wider, and the parties made other stipulations to the effect that the tracts marked "Grover" on chart A, which constituted the remainder of the isolated tracts of the County Company after it had conveyed the 28 and 30 feet strips, were subsequently obtained by the Kansas City Company and "that the several lots and tracts of land now constituting defendant's right of way between Forest Park and the Union Depot (many of which were more than 30 feet in width) not indicated in blue or marked "Grover" on chart A, were obtained by the St. Louis, Kansas City & Northern Railway Company from divers persons by purchase and condemnation," an admission inconsistent with the claim that the Wabash Company's right of way east of the park was only 30 feet wide. When these various stipulations are read together they fail to define or limit the width of the right of way east of the park or otherwise than by the ownership of the Wabash Company.

784 In the course of the proceedings in the intervention the value of the right of way and of the railway facilities thereon became an issue in determining the basis of the compensation to be paid by the Colorado Company for the use it sought. That company produced its chief engineer who testified that he had constructed the railroad of the Kansas City Company from the north line of the park to 18th street and that its right of way east of the park was 30 feet wide and it produced witnesses who testified that the value of this 30 feet strip without the improvements thereon was $265,000. On the other hand, the witnesses for the Wabash Company testified that the value of all the property of that company between the north line of the park and 18th street, including its tracks, side-tracks and other appurtenances necessary for doing the railway business, was from $1,250,000 to $1,500,000, and the master found the value to be $1,000,000. This appraisal was subsequently approved by the court.

Perhaps the most persuasive argument of counsel for the Wabash Company is that Emerson, the engineer of the Colorado Company testified that the right of way east of the park was 30 feet wide, that there were occasional places where there was a side track upon it and that there could be but one track

besides the main track upon this 30 feet, that the master found that the evidence of Emerson and of Lincoln (who was the engineer of the Wabash Company and who testified that the greatest width of the road bed through the park was 30 feet and that he did not know that he could state the width of the
785 right of way from the park to 18th street; that it was of irregular width at different places) showed that owing to the construction of the Wabash road and its side tracks and switches, another track could not be built on the right of way throughout the whole distance although it might be on some parts thereof and that as the Colorado Company could not construct another railroad over the entire length of this right of way, it was entitled to use the tracks and railway facilities of the Wabash Company thereon, and Judge Brewer when he was discussing in his opinion the contention of the Wabash Company that by the tripartite agreement the Wabash Company was required to permit other railroads to use its right of way only and was not bound to allow them to use its tracks or road-bed, said:

"The language of the ninth paragraph, under which as before noticed, intervenors must claim, is that the party of the second part shall permit other railroads to use its 'right of way'. Now the term 'right of way' has a two-fold signification; it sometimes is used to describe a right belonging to a party, a right of passage over any tract, and it is also used to describe that strip of land which railroad companies take upon which to construct their roadbed. Obviously, in this paragraph, it is used in the latter sense. Through both of these contracts the term 'right of way' and 'roadbed' frequently appear, and in all cases the term right of way is used as descriptive of the strip above referred to. * * * So the County Road conveyed to the Kansas Road outside
786 of the park, a strip either thirty or twenty-eight feet in width for its right of way. My thought, at first was that the intervenors could only claim a right to use so much of this right of way as was not in fact occupied by the track of the Wabash, and that all that was intended by this ninth paragraph was to permit other railroad companies to occupy and use so much of the Kansas Road's right of way as it did not itself occupy and use; but after reflection on the argument of counsel, I have been lead to the conviction that this was too narrow a construction, and was not the real intent of the parties. The master, in his report, shows that the entire right of way is occupied by tracks and sidings, so that there is no room for another and independent track, and, as there is nothing to show that this occupation has not been made in good faith, and to supply the needs of the Wabash

company, if my first interpretation had been correct, the intervenors would plainly be without any rights."

If the learned judge had been considering or deciding the width of this right of way or had been endeavoring to give an accurate and comprehensive definition of the term "right of way", when he delivered this portion of his opinion, it might have indicated that he deemed the right of way east of the park 28 or 30 feet wide. But statements in the opinion of courts are authoritative upon the issue pending for decision and under consideration and upon that alone. Judge Brewer was distinguishing the right of way which consists in the right to travel over property from the right of way which consists of the strip of land acquired by a railway company for
787 its railroad tracks and facilities. He was not deciding whether a right of way of the latter class includes land taken by a railroad company which is necessary and convenient for railroad purposes including tracts for round houses turntables, turnouts and switches, or was limited to "that strip of land which railroad companies take upon which to construct their road-bed." If he had been determining this issue, there can be no doubt what his decision would have been. He was not determining what the width of the right of way of the Wabash company was, but whether or not the Colorado company was entitled to use the tracks and other railroad facilities upon that right of way. For this reason he did not attempt to set forth and did not accurately state the origin or extent of that right. His declaration that "the County Road conveyed to the Kansas Road outside of the park, a strip either thirty or twenty-eight feet in width for its right of way" was sufficient for the discussion of the issue he was then considering. But it was inaccurate and would have been misleading in the determination of the width of the Wabash company's right of way, because, as we have seen, the County Road conveyed only isolated strips of land which in the aggregate covered less than 50 per cent of its length and a still smaller percentage of its area. So his statement that the master's report showed "that the entire right of way is occupied by tracks and sidings so that there is no room for another and independent track" is a declaration not that the entire right of way was thus occupied, but as the master's report was, that
788 it was so occupied at some places that there was no room for another and independent track the entire length of it. This conclusion appears to have been as true of the entire strip as it was of the thirty feet, so that there is nothing in this statement in Judge Brewer's opinion or in the master's report or in the testimony upon which it is based to prove with any reasonable certainty that the decree which he

subsequently rendered and which on its face subject the entire strip and all the railway facilities thereon then owned by the Wabash Company to the joint use, did not express his deliberate conclusion, or that he intended to limit that use to a part of this strip 30 feet in width and the tracks thereon.

Counsel for the Wabash Company review the foregoing facts and insist that the Colorado company is estopped from claiming that the decree gives it the joint use of more than 30 feet in width east of the park (1) by its amended petition, but the Colorado company prayed in that petition for the use of a broader strip the width of which was undefined save by the limits of the strip then owned by the Wabash Company, (2) by the stipulation that the property conveyed by the deed of August 11, 1875, was 30 feet in width as a rule, but the parties made another stipulation that the tracts of varying width between the detached strips conveyed by that deed were also parts of the right of way of the Wabash company, (3) by the evidence of its witnesses that this right of way was only 30 feet wide and that its value, without the improvements there-
789 on, was only $265,000 and by the position of its counsel stated in an objection to evidence offered by the Wabash Company of the value of all its real estate between the north line of the park and 18th street and of the tracks and side tracks thereon and the other necessary appurtenances that the Colorado Company was not asking for the use of these tracks, side tracks or appurtenances, but for the use of the strip of 30 feet without them, only. But no estoppel arose here because the Wabash Company secured an overruling of the objection and a disregard of the testimony and obtained a decree upon the opposite theory. The record discloses no act or omision of the Colorado Company before the decree, which estopped it from claiming the full benefit of it.

It is strenuously contended, however, that counsel for that company conclusively estopped it from securing the use of more than 30 feet in width of the property of the Wabash company east of the park by the answer they made in their brief upon the appeal to the complaint of the Wabash company that the decree was too broad. That complaint was:

"The Court erred in [illegible]ering a decree broader than the contract.

"Even if the ninth clause of the tripartite agreement was binding on the Kansas City company, it only required it to permit other railroads to use its 'right of way,' and yet a decree was entered giving respondent the use of 'the right of
790 way, tracks, switches, turnouts, turntables and other terminal facilities of the Wabash company' at St. Louis.

"Again the decree is not only broader that the contract, but it is broader than the prayer of the petition. The prayer of the petition is, that the Colorado Company be permitted to use the right of way of the Wabash Company, 'commencing at the north line of said park, thence over said right of way to Eighteenth street in said city of St. Louis, by running its engines and cars over and upon said right of way, including the tracks of said Wabash Company between said points.'

"The contract only related to 'right of way'; the prayer of the petition was for the use of 'right of way and tracks', and the decree not only gives them the use of the 'right of way and tracks', but it is subject to the use of respondent the 'switches, side tracks, turnouts, turntables and other terminal facilities,' and even goes so far as to require the Wabash Company to keep those additional properties in repair for respondent's use.

"Therefore, no matter what view may be taken of the case in other respects, the decree was erroneous in two particulars: First, because it is broader than the covenant; and second, because it is broader than the prayer of the bill. Both of these objections are elementary."

And the counsel for the Colorado company answered it in these words:

"The contract permits other roads to use the tracks of
791 the County and Kansas City roads, and the decree gives the use of the tracks including turntables and other terminal facilities of the Wabash Company on its right of way. The record shows that the width of the right of way of appellants at Tayon avenue or Eighteenth street, being the terminus of the road at the Union Depot, is about forty feet. This is shown by chart A, in evidence. The side tracks, turnouts, etc., mentioned in the decree at the terminus are upon this forty feet, which is the right of way. Appellants have no depot of any kind, freight or passenger, to be used by any other road—the turntable, of course, is necessary for use of the tracks, as also the switching and sidings."

"Respondents under the decree, could only use what the evidence shows the appellants had, hence there is nothing in the contention that the decree is broader than the provisions of section 9, or the prayer of the bill."

"The record further shows that the Union Depot Company take charge of all trains, and have side track facilities for loading and unloading trains."

The most striking thing about these arguments is that counsel for the Wabash company nowhere claimed that the decree was too broad because it granted the joint use of all its right

of way east of the park upon the ground that the condition on which the decree was founded extended to a strip only 30 feet in width through it, but conceded that the grant of its entire right of way and tracks was admissible and ob-
792 jected only to the grant of the use of its switches, side tracks, turnouts, turntables and terminal facilities. Nor did it object to the grant of this use upon the ground that these were not upon its right of way or upon the 30 feet strip, but upon the sole ground that while the decree admissibly gave to the Colorado company the joint use of its right of way and tracks, the grant of the use of its "switches, side tracks, turnouts, turntables and other terminal facilities" was unwarranted. Nor do we find in the answer of the Colorado company any concession or statement that the width of the right of way of the decree was 30 feet. On the other hand, it contains the counter-assertion that it was about 40 feet in width at its eastern terminus and that the side tracks, turnouts &c. at this terminus were upon this forty feet. An assertion that a right of way is forty feet wide at one end cannot work as estoppel from insisting that it is more than 30 feet in width has been under consideration was overruled by the Supreme Court, the decree was affirmed, and thereby the question whether or not the decree was too broad became res adjudicata.

This court has not failed the facts that the public interest and the pecuniary interests involved in this litigation are important and permanent and that the effect of its decision may reach far into the future. All the reasons suggested by the court below and by the Wabash Company why the decree of 1886 should be limited to, or construed to mean a right of way 28 or 30 feet in width east of the park and the railway facilities thereon, only, have been thoughtfully and de-
793 liberately considered, and their main arguments have been discussed. They have failed to convince with any certainty that such is the true meaning of the decree or that such was the intention of the decree or that such was the intention of the judge who framed it or of the Supreme Court which affirmed it. On the other hand, the facts that the Colorado Company described, and prayed for the use of a wider strip in its amended bill, that the turntables described in the decree and some of the side tracks and turnouts were not upon the 30 feet strip, that the right of way at 18th street was stated to be 40 feet in width in the Supreme Court, that no claim was ever made by the Wabash Company during the litigation which resulted in the decree that the use of the Colorado Company should be limited to a tract of less width than the entire strip then owned by the Wabash Company, that this entire strip was necessary or convenient and was secured by the Wabash

Company for its tracks, side tracks and terminal facilities, that the ordinary significance of the term "right of way" under such circumstances is the entire strip procured for such purposes, and the plain and unlimited provisions of the decree that the Colorado Company shall enjoy the use "of said right of way, tracks, switches, side tracks, turnouts, turntables and other terminal facilities" of the Wabash Company between the north line of the park and 18th street cogently persuade that the true meaning of the decree and the actual intention of the learned jurist who rendered it was to adjudge to the Colorado Company the use of the entire strip then owned by the Wabash Company and the railway facilities thereon. And
794 when to these considerations are added the fact that the partial defense that the condition of the tripartite agreement which was the foundation of the intervention attached to only 30 feet in width of the wider strip which the Wabash Company owned, was open to that company in that proceeding in both courts and was never presented and the indubitable rule of law that a second suit between the same parties or those in privity with them, upon the same claim or demand a judgment upon the merits is conclusive, not only as to every matter offered, but as to every admissible matter which might have been offered to sustain or defeat the claim or demand (Cromwell v. County of Sac, 94 U. S. 351, 352; Dickson v. Wilkinson, 3 How. 57, 61; Dimock v. Copper Co., 117 U. S. 559, 565; Commissioners v. Platt 79 Fed. 567, 571, 572, 25 C. C. A. 87, 91, 92), there remains no legal or rational way of escape from that conclusion.

The evidence and arguments drawn from the acts and omissions of the parties since the decree of 1886, was rendered have been considered, but nothing has been discovered in them to avoid or modify this conclusion.

Finally, counsel contend that this is not a "hard and fast" decree, that the Colorado Company is applying to a court of equity to enforce it, that the court should not grant inequitable relief and that any broader relief than that given by the decree challenged by this appeal would be of this character.

A decree for the joint use of railway facilities may be fair and just when rendered and such radical changes may
795 subsequently be wrought that its continued enforcement would work great injustice. A court of equity always has the power and the judicial discretion to refuse to compel inequity and to condition the relief it grants with the requirement that he who seeks equity shall do equity. If such changes in the situation, rights or relations of these parties had occurred subsequent to the entry of this decree that its continued

enforcement would be unjust the courts would withhold their aid or condition it by new and equitable terms. But the original decree was conclusive of the rights and remedies of the parties at that time and thereafter until subsequent changes of conditions rendered some modification of the relief it granted just and equitable. It is to be interpreted and enforced in the light of the rules and principles of equity and of the opinions of courts upon which it was founded. For example, the use granted to the Colorado Company is the surplus use, that use which the business of the Wabash Company does not require, and as Judge Brewer said in the opinion upon which the decree is based, the time may come when that business will demand the entire use of the property and the Colorado Company's right to use it may entirely cease. Central Trust Co. v. Wabash, St. L. & P. R. Co., 29 Fed. 558. But there is no evidence in this case of any such requirement or of any change of conditions which now renders the original decree less just than when it was entered. Nor was it originally, nor is its enforcement now inequitable or unjust. Questions of this na-
796 ture have repeatedly received the consideration of this court and its views upon them have been approved by the Supreme Court. Union Pac. Ry. Co. v. Chicago, R. I. & Pac. Ry. Co., 2 C. C. A. 174, 232, 234, 51 Fed. 309, 318, 319, 321; Union Pac. Ry. Co. v. Chicago &c. Ry. Co., 163 U. S. 564, 585; Union Pac. Ry. Co. v. Mason City & Fort Dodge Ry. Co., 64 C. C. A. 348, 358, 128 Fed. 230, 240; Union Pacific Co. v. Mason City &c. Co., 199 U. S. 160, 171. In the case first cited we said:

"Courts cannot be blind to the fact that every railroad company cannot have entrance to our great cities over tracks of its own, or to the fact that railroad companies do, and every public interest requires that they should, make proper contracts for terminal facilities over the roads of each other" and we sustained and enforced a contract of the Union Pacific Company to grant the surplus or waste use of its bridge and terminal facilities at Omaha and South Omaha to the Rock Island Company. In the Mason City and Fort Dodge case this court enforced a similar use of the same property by another railroad company under acts of Congress, and said in answer to the argument that the latter company might build its own bridge: "The latter suggestion is unworthy of serious consideration. It is undoubtedly possible, but it is neither practicable nor advisable, either in the interest of the appellee or in the interest of the public whom it serves, that that company should invest the large amount of money that would be required to construct another bridge and to purchase a right of way
797 through the city of Omaha, and that it should consequently impose upon the traffic of the country the tax

that would be necessary to pay it a fair income upon such an investment."

It is undoubtedly possible for the Colorado Company to acquire the railway facilities in the city of St. Louis which it seeks under the decree of 1886 by purchase, condemnation and construction or by a more expensive contract with the Wabash or with some other company, but such a proceeding would burden the traffic of the country with the tax necessary to pay a fair income upon the investment of the increased expense of the new contract. The Wabash Company has the use of a right of way and of railway facilities in the city of St. Louis a part of which its business does not require. It obtained it subject to a condition imposed by the park commissioners for the benefit of the city and of the citizens of St. Louis that the Colorado Company should enjoy this surplus use on reasonable terms. Those terms have been determined and have been approved by the highest court in the land. No change of conditions since the decree of 1886 was rendered has been proved which makes its enforcement oppressive and it is just and equitable to it, to the public and to the Colorado Company that it should be enforced as it was rendered until some such change is wrought.

The conclusion is that the Colorado Company is entitled to enjoy the joint and equal use of the entire strip of land between the east line of the park and 18th street which the Wabash owned or had acquired the right to use when the decree
798 of 1886 was rendered, and of the tracks, side tracks, turnouts, turntables and terminal facilities now thereon. But it is not entitled to the use under that decree of any of the property, industrial or railway facilities of the Wabash Company beyond the limits of that strip. Union Pac. R. Co. v. Mason City & Fort Dodge R. Co., 199 U. S. 171.

The question whether or not equity demands the decree in this case to be conditioned by the requirements that the Colorado Company shall henceforth pay in addition to the amount specified in the decree of 1886 six per cent. per annum upon one-half of the cost or value of the improvements which the Wabash Company has placed upon this right of way since 1886 or by any other requirement and questions pertinent to an accounting between the parties have not been considered, because there is no cross appeal and this decision does not foreclose the consideration and determination of these issues, if any, by the court below previous to the entry of its decree. Guarantee Co. v. Phenix Ins. Co., 59 C. C. A. 376 Fed. 170.

The decree below is reversed and the case is remanded to the Circuit Court with instructions to render a decree not inconsistent with the views expressed in this opinion.

Filed April 3, 1907.

Hook, Circuit Judge, specially concurring:

I concur in the reversal of the decree of the trial court and also for the most part in what is said in the foregoing opinion. I do not, however, concur in the exclusion of the industrial tracks from the operation of the decree of 1886. These tracks are the usual and necessary features of railway terminals in a large city and are as much a part thereof as the limbs
799 are of a tree. They go with the right of way as appendages thereto and are always so regarded. Their use is essential to the enjoyment of the rights awarded. In my opinion they are clearly within the spirit of the decree of 1886 and also by fair construction within its letter. The decree granted to the intervenor the "right of way, tracks, switches, side tracks, turnouts, turntables and other terminal facilities of the Wabash Railway Company between the north line of Forest Park and Eighteenth street in the city of St. Louis." This is very broad language and it was repeatedly employed in the decree. That Judge Brewer intended to include such industrial tracks as were in existence when the decree was made also seems plain from his opinion (29 Fed. 559). The cost of their construction was included in the total cost upon which the percentage compensation to be paid by the intervenor was based. Moreover, the consistent course of conduct of the parties for thirteen years following the decree shows that they regarded them as being a part of the property the joint use of which was granted to the intervenor. I am unable to see any persuasive reason for excepting them from the comprehensive enumeration of terminal facilities in the decree. That they extend beyond the side lines of the strip of land owned by the Wabash Company and upon the land of others seems to me to be a circumstance wholly immaterial, and yet it must be the circumstance upon which their exclusion from the decree is made to depend. The Wabash Company owns these industrial tracks and operates them as part of its right of way and terminal facilities. Of what importance is it that they are in part upon public highways and the land of others under license instead of being wholly upon land owned by that company? If the latter condition existed it would doubtless be conceded that they fell within the decree. The scope of the decree is therefore determined not by the character
800 of the tracks and their relation to the right of way and terminal facilities as a whole with which the court was dealing, but by the character of the title of the Wabash Com-

pany to the ground upon which the tracks are laid. It seems to me there has been a narrowing of the decree in this particular.

The case of Union Pacific Company v. Mason City Company, 199 U. S. 160, 171, is not an authority for this construction of the decree. The court was there considering a claim of the Mason City Company for the use of the Union Pacific bridge across the Missouri River at Omaha, and its approaches. Naturally this would not include industrial tracks and switches. Indeed, when rightly regarded, the decision of the Supreme Court makes for a conclusion contrary to that reached by my associates. An act of Congress conferring in most general terms upon other railroad companies the right to cross the bridge at Omaha was held to give the Mason City Company the right not only to cross the bridge but to use several miles of main and passing tracks of the Union Pacific in the cities of Omaha and South Omaha. The decision well serves to illustrate the liberality with which provisions of the kind we are now discussing are construed when public interests are involved.

Of course the right to use industrial tracks laid since the decree of 1886 was rendered would require consideration of the subject of compensation. The compensation specified in the decree does not include them.

There are also some other observations near the close of the foregoing opinion which I think are not necessary to the consideration of the case. They relate to conditions which
801 it is conceded do not exist at present and which may never arise in the future. I do not wish to express or concur in any view concerning them until they arise and are presented for judgment in the usual way.

Filed April 3, 1907.

"Exhibit 2".

United States of America—ss.

The President of the United States of America, To the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Missouri—Greeting:

(Seal)

Whereas, lately in the Circuit Court of the United States for the Eastern District of Missouri, before you, or some of you, in a cause between the Central Trust Company of New York, et al., complainants, and the Wabash, St. Louis and Pacific Railway Company, et al., defendants, and wherein the St. Louis, Kansas City and Colorado Railroad Company filed its

intervening petition against the Wabash Railroad Company et al., and wherein the decree of the said Circuit Court in said cause, entered on the 2nd day of April A. D. 1906, is in the following words, viz:

802 "This cause came on for final hearing this 2nd day of April, 1906, upon the motion and application of the St. Louis, Kansas City and Colorado Railroad Company. The parties appeared by counsel. The intervenor appeared by M. A. Low, W. F. Evans and Frank Hagerman, its solicitors; and the Wabash Railroad Company appeared by Wells H Blodgett, H. S. Priest, C. N. Travous and J. L. Minnis, its solicitors. The cause was submitted upon the bound volume of testimony in this cause, entitled and designated 'Pleadings and Evidence', and two plats marked 'Chart A' and 'Exhibit D' respectively; and the court having heard the arguments of counsel, and being fully advised in the premises orders, adjudges and decrees:

The decree of December 31, 1886, set out in the intervenor's application and motion is in full force and effect, and is binding upon the St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, and upon the defendant, Wabash Railroad Company, its successors and assigns, and the said Wabash Railroad Company, its officers, agents, and employes, are hereby enjoined to forthwith accord to the St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, upon the terms fixed in said decree, and subject to the regulations therein set forth, the equal right to use, with the engines and cars (loaded or empty) of the latter, the right-of-way, tracks switches, side-tracks, turnouts, turn-tables and other terminal facilities of the Wabash Railroad Company in St. Louis, Missouri, between the north line of Forest Park and Eighteenth Street.

And it is further, adjudged and decreed that the words 'tracks, switches, side-tracks, [switches, side-tracks,] turnouts,
803 turntables and other terminal facilities of the Wabash Railroad Company in St. Louis, Missouri, between the north line of Forest Park and Eighteenth street', and hereinbefore used and as used in the original decree in this case, correctly interpreted and understood, mean only such tracks, switches, side-tracks, turnouts, turntables, and Terminal facilities as are or may be situated and located upon the strip of land 42 feet wide, commencing at the north line of Forest Park where the railway of the Wabash Railroad Company enters said Park; thence along said strip, or right of way, on which the said railway is located, through said park, and thence, over a strip of land 28 or 30 feet wide on which is located the said railway, to said Eighteenth street, in the city of St. Louis, it

being a continuous strip from the north line of Forest Park to said Eighteenth Street, and does not embrace any tracks of any kind not situate on said strip of land just described; and said Wabash Railroad Company, its officers, agents and employes are enjoined from refusing to permit such use, under the terms of said decree, and subject to the regulations therein set forth, by the said St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, the right to the use by the said St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, which the said Wabash Railroad Company is enjoined to forthwith accord, and is enjoined from refusing, is not limited to the ingress and egress of said St. Louis, Kansas City & Colorado Railroad Company, with its trains, engines, and cars to and from the north line of Forest Park to Eighteenth Street in St. Louis, Missouri, but
804 does include in all respects, subject to the terms of said decree, as hereinbefore interpreted, and subject to the regulations therein set forth, the right to the equal use and benefits, with its engines, cars and trains, of all the right-of-way, tracks, switches, side-tracks, turnouts, turn-tables and other terminal facilities which are or may be situate as hereinbefore defined, and the right to so use the said terminal facilities between the points aforesaid for all purposes that they are now used, or are susceptible of being used by the said Wabash Railroad Company, under the said regulations provided for in said original decree.

It is further ordered, adjudged and decreed that the St. Louis, Kansas City & Colorado Railroad Company and the Wabash Railroad Company each pay its own costs and expenses in this proceeding, to be herein taxed, and that execution issue therefor.

No appeal shall supersede the injunctive portion of this decree.

JOHN H. ROGERS,
U. S. District Judge.

St. Louis, Mo., April 2nd, 1906."

As by the inspection of the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals for the Eighth Circuit, by virtue of an appeal agreeably to the act of Congress, in such case made and provided fully and at large appears, and Whereas, in the present term of December, in the year of our Lord one thousand nine hundred and six, the said cause came on to be heard before the said United States Circuit Court of Appeals on the transcript of record from said Circuit Court, and was
805 argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said

Circuit Court, in this cause, be, and the same is hereby, reversed with costs; and the [the] St. Louis, Kansas City and Colorado Railroad Company have and recover against the Wabash Railroad Company, the sum of Three Hundred and Eighty Two and 90/100 Dollars for its costs in this behalf expended and have execution therefor.

It is further ordered that this cause be and the same is hereby remanded to the said Circuit Court with directions to enter a decree not inconsistent with the views expressed in the opinion of this Court.

April 3, 1907.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had the said appeal notwithstanding.

Witness, the Honorable, Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the Third day of June in the year of our Lord one thousand nine hundred and seven.

Costs of Appellant:

Clerk	$ 27.15
Printing record	335.75
Attorney	20.00
	$382.90

806 (Sgd.) JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

And afterwards to-wit: on the 20th day of December A. D. 1907 the following among other proceedings were had and appear of record in said cause, to-wit:

(Final Decree.)

807 In the Circuit Court of the United States for the Eastern District of Missouri.

Central Trust Company, et al., Complainants,
Nos. 2357 and 2464 vs. In Equity.
Wabash, St. Louis & Pacific Railway Company, et al., Defendants.

Consolidated.

In the Matter of the Intervening Petition of the City of St. Louis and St. Louis, Kansas City and Colorado Railroad Company.

This cause came on for final hearing this 20th day of December, 1907, upon the motion and application of the St. Louis, Kansas City & Colorado Railroad Company and the mandate of the Circuit Court of Appeals for the Eighth Judicial Circuit. The parties appeared by their respective counsel, the Intervenor appearing by M. A. Low, W. F. Evans and Frank Hagerman, its Solicitors; and the Wabash Railroad Company by H. S. Priest, J. L. Minnis and Wells H. Blodgett, its Solicitors.

The cause was submitted upon the bound volume of testimony in this case, entitled and designated, "Pleadings and Evidence," two plats marked "Chart A" and "Exhibit D," respectively, and the Amendment to Petition of the St. Louis, Kansas City &
808 Colorado Railroad Company, and upon the mandate and opinion of the Circuit Court of Appeals.

The Court, having heard the arguments of counsel and being fully advised in the premises, orders, adjudged and decrees:

I.

The decree of December 31st, 1886 set out in the intervenor's application and motion, is in full force and effect, and is binding upon the St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, and upon the defendant Wabash Railroad Company, its successors and assigns. The said Wabash Railroad Company, it officers, agents and employés, are hereby enjoined to forthwith accord to the St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, upon the terms fixed in said decree, the enjoyment of the joint and equal use of the entire strip of land between the east line of Forest Park and Eighteenth Street in St. Louis, Missouri, which the predecessor of the Wabash Railroad Company owned or had acquired the right to use when the said decree of December 31, 1886, was rendered, and of the tracks side-tracks, turn-outs, turntables and terminal facilities now thereon, but is not entitled to the use under that decree of any of the property industrial, or railway facilities of the Wabash Railroad Company beyond the limits of that strip and said Wabash Railroad Company, its officers, agents and employés are enjoined from refusing to permit such use under the terms of said decree by said St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns.

II.

It is further ordered, adjudged and decreed, that each party
809 pay one half of the costs and expenses including printing in this court, to be herein taxed, and that execution issue therefor.

No appeal shall supersede the injunctive portion of this decree.

JOHN H. ROGERS, *Judge.*

Dec. 20, 1907.

806 And thereupon to-wit: on said 20th day of December, A. D. 1907, the following further proceedings were had and appear of record in said cause as follows, to-wit:

(Order Allowing Appeal to Supreme Court.)

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

2357 and 2464.

CENTRAL TRUST COMPANY OF NEW YORK ET AL., Complainants,
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendants; ST. LOUIS, KANSAS CITY & COLORADO RAILROAD COMPANY, Intervenor.

Order Allowing Appeal.

Now at this day comes said intervenor by its solicitors and files and presents to the Court its Assignment of Errors, Petition for an Appeal from the final decree this day entered herein to the Supreme Court of the United States at the City of Washington, D. C., and appeal bond in Five Thousand Dollars, conditioned as required by law; upon due consideration whereof it is ordered that said
807 appeal be and the same is hereby granted as prayed, and said bond approved; and that the Clerk of this Court make and certify to said Supreme Court of the United States at the City of Washington, D. C., a full true and complete transcript of the record, and proceedings as fully as the same remain on file and of record in this cause in his office; and now a Citation citing and admonishing the Wabash Railroad Company and the City of St. Louis, Missouri, to be and appear in said Supreme Court within thirty days from and after this date is signed by the Judge and filed.

JOHN H. ROGERS,
U. S. Dist. Judge for the West'n Dis't of Kansas, Assigned to and Sitting in the Circuit Court of the United States for the East'n Div. of the East'n Dist. of Missouri.

December 20th, 1907.

808 Which said Assignment of Errors, Petition for Appeal and Bond are respectively in words and figures as follows, to-wit:

(Assignment of Errors, Supreme Court.)

In the Circuit Court of the United States for the Eastern Division, Eastern District of Missouri, Eighth Judicial Circuit.

In Equity. Nos. 2357 and 2464. Consolidated Cause.

CENTRAL TRUST COMPANY OF NEW YORK ET AL., Complainants,
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendants.

In the Matter of the Intervening Petition of the City of St. Louis and The St. Louis, Kansas City and Colorado Railroad Company, Filed Herein July 12th, 1886.

Application and Motion of The St. Louis, Kansas City and Colorado Railroad Company.

Assignment of Errors.

Now comes the St. Louis, Kansas City and Colorado Railroad Company, and presents this assignment of errors as part of its
809 application for an appeal, and respectfully shows that the Court aforesaid, in the above entitled cause, upon said motion and application, erred in each of the following rulings:—

1. In rendering the decree of December 20th, 1907, for that the same was contrary to the law and contrary to the evidence in the case.

2. In rendering and entering that portion of said decree providing, "But it is not entitled to the use, under that decree of any of the property, industrial or railway facilities of the Wabash Railroad Company, beyond the limits of that strip."

3. In rendering and entering the said decree and particularly each portion thereof herein complained of, the Court failed to give full faith and credit to the decree of December 31st, 1886, and its affirmance to which appellant was entitled, under and by virtue of the following provisions of the constitution of the United States:—

Section 8, Article I: Section- 1 and 2 of Article III; Section 1 of Article V and Article VI.

W. F. EVANS,
FRANK HAGERMAN,
For Appellants.

810 (*Petition for Appeal, Supreme Court.*)

In the Circuit Court of the United States for the Eastern Division of Eastern District of Missouri, Eighth Judicial Circuit.

CENTRAL TRUST COMPANY OF NEW YORK ET AL., Complainants,

vs.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendants.

In Equity. Nos. 2357 and 2464. Consolidated Cause.

In the Matter of the Intervening Petition of the City of St. Louis and The St. Louis, Kansas City and Colorado Railroad Company, Filed Herein July 12th, 1886.

Application and Motion of The St. Louis, Kansas City and Colorado Railroad Company.

Application of the St. Louis, Kansas City and Colorado Railroad Company for an Appeal.

811 Now comes the St. Louis, Kansas City & Colorado Railroad Company and respectfully shows that upon December 20th, 1907, there was entered in the above entitled cause upon the said application and motion, a decree, from which said Company desires to and does hereby appeal.

There is attached hereto and made a part hereof an assignment of errors, and there is presented herewith a proper bond.

Wherefore, said Company asks that an appeal be allowed to the Supreme Court of the United States and for reversal of said decree.

W. F. EVANS,
FRANK HAGERMAN,
Solicitors for St. Louis, Kansas City & Colorado Railroad Company.

Allowed this December 20th, 1907.

JOHN H. ROGERS, *Judge.*

812 (*Bond on Appeal, Supreme Court.*)

In the Circuit Court of the United States for the Eastern Division of Eastern District of Missouri, Eighth Judicial Circuit.

In Equity. Nos. 2357 and 2464. Consolidated Cause.

CENTRAL TRUST COMPANY OF NEW YORK ET AL., Complainants,
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defendants.

In the Matter of the Intervening Petition of the City of St. Louis and The St. Louis, Kansas City and Colorado Railroad Company, Filed Herein July 12, 1886.

Application and Motion of The St. Louis, Kansas City and Colorado Railroad Company.

Bond.

813 UNITED STATES OF AMERICA, *sct:*

Know all men by these presents That we, St. Louis, Kansas City and Colorado Railroad Company and A. J. Davidson are held and firmly bound unto Wabash Railroad Company, and any other party interested, in the full and just sum of five thousand Dollars, ($5,000), to be paid to said Wabash Railroad Company, its successors and assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and successors jointly and severally by these presents.

Sealed with our seals and dated this 20th day of December, A. D. 1907.

Whereas in the above entitled cause, upon the said application and motion, a decree was rendered against the said St. Louis, Kansas City and Colorado Railroad Company, which has obtained an appeal to reverse the said decree and a citation directed to the said Wabash Railroad Company, citing and admonishing it to be and appear in the United States Supreme Court, at the city of Washington, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such that if the said St. Louis, Kansas City and Colorado Railroad Company shall prosecute said appeal to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

ST. LOUIS, KANSAS CITY AND COLORADO RAILROAD COMPANY,

814 By W. F. EVANS, *Its Solicitors.* [SEAL.]
A. J. DAVIDSON. [SEAL.]
——— ———. [SEAL.]

The above bond is hereby approved this December 20, 1907, and ordered to be filed and made a part of the record.

JOHN H. ROGERS, *Judge.*

815 And afterwards to-wit: on the 14th day of January, A. I
1908, there was filed in said cause a Præcipe for Transcrip
which said præcipe is in words and figures as follows, to-wit:

(*Præcipe for Transcript.*)

In the Circuit Court of the United States for the Eastern Divisio
of the Eastern Judicial District of Missouri.

2357 & 2464.

CENTRAL TRUST COMPANY OF NEW YORK ET AL., Complainant
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL., Defen
ants; ST. LOUIS, KANSAS CITY & COLADO RAILROAD COMPAN
Intervenor.

Præcipe for Transcript.

To James R. Gray, Clerk of said Circuit Court:

SIR: In preparing transcript on appeal of the above-entitled cau
to the United States Supreme Court you are hereby requested
include therein none but the following records, pleadings and proo
to-wit:

(1) Volume entitled "Pleadings and Evidence;"
(2) Mandate of U. S. Court of Appeals, Eight- Circuit.
(3) Order allowing Amendment of Intervening Petition and sa
Amendment:
(4) Final decree entered December 20th, 1907:
(5) Order allowing appeal to said Supreme Court;
816 (6) Assignment of Errors on said appeal;
(7) Petition for said appeal;
(8) Bond on said appeal;
(9) Certificate of Clerk.

W. F. EVANS AND
FRANK HAGERMAN,
Sol'r- for said Intervenor.

(*Clerk's Certificate.*)

UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

In the Circuit Court of the United States in and for the Divisio
and District Aforesaid.

I, James R. Gray, Clerk of the Circuit Court of the United Stat
in and for the Eastern Division of the Eastern Judicial District
Missouri, do hereby certify that the above and foregoing is a ful

true and complete transcript of the record and proceedings in the cause therein entitled, as called for, and as restricted by the præcipe for transcript hereinbefore set forth, together with all things of and concerning the same, as fully as the same remain on file and of record in said cause in my office: and that the original Citation is hereto attached and herewith returned.

In witness whereof, I hereunto set my hand and affix the seal of said Court at office in the City of St. Louis this 15″ day of January, A. D. 1908.

[Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.]

JAMES R. GRAY,
Clerk of said Court.

Endorsed on cover: File No. 20,980. E. Missouri C. C. U. S. Term No. 577. St. Louis, Kansas City & Colorado Railroad Company, appellant, *vs.* The City of St. Louis and Wabash Railroad Company. Filed January 17th, 1908. File No. 20,980.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909

No. 57.

ST. LOUIS, KANSAS CITY AND COLORADO RAILROAD COMPANY, APPELLANT,

vs.

WABASH RAILROAD COMPANY AND CITY OF ST. LOUIS, APPELLEES.

SUPPLEMENTAL BRIEF OF WABASH RAILROAD COMPANY.

On reflection we concluded the questions propounded by members of the court on the oral argument deserved more deliberate consideration than we were then able to give them, and accordingly asked and obtained leave to file a supplemental brief covering the points thus called to our attention, which we herewith submit.

In accordance with the request of Mr. Justice Day, we have, at the conclusion of this brief, made reference to the testimony in the transcript which we claim shows that the Colorado Company did not pay a share of the costs of the construction of the industrial tracks, and that its cars were handled by Wabash engines on the industrial tracks under

an agreement between the operating officials of the two companies, entirely aside and separate from the decree, and that the contributions of the Colorado Company toward the maintenance of those tracks were made under such agreement.

I.

Reply to the inquiry made by the Court with respect to the decisions in Loeb v. Columbia Township, Trustee, 179 U. S. 472, and MacFadden v. U. S., 213 U. S., 288, and other similar cases.

1. These cases hold, that this court, may review on writ of error or appeal, a judgment or decree of a circuit court in a case wherein the jurisdiction of the circuit court has been invoked on the ground of diverse citizenship of the parties, provided a constitutional question is properly presented by the record.

This ruling, however, has no bearing on the case at bar, because the case at bar is an intervention suit, in the case of the Central Trust Company *et al. v.* Wabash, St. Louis and Pacific Railway Company, Nos. 2357 and 2464 (page 3, transcript).

It is conceded by learned counsel for the Colorado Company (page 9 of his brief in support of the petition for certiorari) that the jurisdiction of the circuit court in the latter or main case was invoked on the ground of diverse citizenship of the parties thereto. The record shows that the main case was a suit to foreclose a mortgage, and it is not contended that any constitutional question arose in that case.

The court, has often held, that for the purposes of an appeal or writ of error, the ground of jurisdiction in an intervention suit, will be ascribed to that of the main case.

Rouse *v.* Letcher, 156 U. S., 47.

Learned counsel for the Colorado Company concede this legal proposition on page nine of their brief in support of the petition for certiorari, where the following cases will be found cited in support. Gregory *v.* Van Ee, 160 U. S., 643; Carey *v.* R. Co., 161 U. S., 115; Rouse *v.* Hornsby, 161 U. S., 588; Pope *v.* L. & N. R. Co., 173 U. S., 573.

In the cases above cited constitutional questions were presented by the intervening petitions or arose in the progress of the intervention suits, but it was held that as the jurisdiction in the main cases rested on the diverse citizenship of the parties, appeals or writs of error would not lie to this court from decrees or judgments rendered in the intervention suits. These decisions, then, afford grounds for affirming that this court has not jurisdiction to review on appeal the decree entered by the circuit court in accordance with the mandate, even if it were conceded that an appeal would lie from that decree and that constitutional questions were properly and timely presented.

2. The Loeb, McCracken, and other similar cases, further hold that the defeated party may at his election appeal either to this court or the Circuit Court of Appeals from a decree entered in the circuit court in a cause between citizens of different States wherein constitutional questions are involved, but if he prosecutes his appeal to the Circuit Court of Appeals the decree of that court will be final and he cannot thereafter prosecute an appeal to this court.

If the Circuit Court of Appeals by its decision in the appeal prosecuted by the Colorado Company there, failed to give full faith and credit to the decree of December 31, 1886, it necessarily follows that the circuit court by entering the decree from which that appeal was prosecuted, failed to give full faith and credit to the decree of December 31, 1886, because the decree of the circuit court gave the Colorado Company *less* than the Circuit Court of Appeals gave it. If, then, the reasoning by which learned counsel endeavor to

support the contention that a constitutional question exists in the case be sound, the Colorado Company was entitled to appeal from the first decree rendered by the circuit court either to this court or to the Circuit Court of Apepals. It elected to take its appeal to the Circuit Court of Appeals, where it prevailed. The decree of reversal was in favor of and in response to the prayer and insistence of the Colorado Company, and it was suffered to become final.

If it were conceded that a constitutional question did not arise until the decision of the Circuit Court of Appeals, the Colorado Company then might have applied to this court for a writ of certiorari, which this court might have in its discretion allowed at that stage of the proceedings. Forsyth *v.* Hammond, 166 U. S., 506; Harriman *v.* Northern Securities Company, 197 U. S., 244. But the Colorado Company chose to avail itself of the favorable decision of the Circuit Court of Appeals, which is embodied in the decree entered pursuant to the mandate, and from *this vantage point* thus gained by the decision of the Circuit Court of Appeals it endeavors to prosecute an appeal in this court and another appeal in the Circuit Court of Appeals. It then not only *elected* to prosecute an appeal to the Circuit Court of Appeals from the first decree, but it *has availed itself of the favorable decision of that court.*

Besides, as the Colorado Company was the prevailing party on appeal to the Circuit Court of Appeals, the decree entered pursuant to the mandate was in a legal sense entered upon its motion. The Wabash Company was not interested in having that decree entered, and is in no sense responsible for it. The Colorado Company must be regarded as the moving party in placing itself in a position to enjoy the fruits of its appeal to the Circuit Court of Appeals. The decree entered pursuant to the mandate is final and conclusive on the Wabash Company. It could not have appealed from that decree, notwithstanding the decree was against it and in favor of the Colorado Company. On what ground

then, can the Colorado Company base its claim that it was not also bound by the decree.

We can conceive of no legal principle which would afford a basis for the present contention of the Colorado Company that it has the right to hold on to what it obtained by the favorable decision of the Circuit Court of Appeals, as embodied in the decree entered pursuant to the mandate, and at the same time prosecute therefrom an appeal to this court or a further appeal to the Circuit Court of Appeals. Certainly the decisions of this court do not afford a basis for such a contention.

II.

Reply to the inquiry with respect to the power of the Circuit Court under the mandate.

The Circuit Court of Appeals (Transcript, 601, l. c. 619; 152 Fed. Rep., 849, l. c. 863) decided the entire case or claim of the Colorado Company, but left the Circuit Court at liberty to entertain an application of the Wabash Company for a readjustment of the rental the Colorado Company was obligated to pay for the use of the property.

On the oral argument we were asked whether the circumstance that the Wabash Company was not foreclosed by the decision of the Circuit Court of Appeals from applying for a readjustment of the rental did not distinguish the case at bar from the case of Stewart *v.* Salamon, 97 U. S., 361, and similar cases, which hold that an appeal cannot be prosecuted from a decree entered in exact conformity with a mandate of an appellate court. The point suggested is whether the reservation in the opinion of the Circuit Court of Appeals to the Wabash Company of the right to apply for a readjustment of the rental, left judicial power or discretion in the Circuit Court with respect to the decree it should enter. It is conceded that the Wabash Company did not exercise

any right reserved to it or present any question for decision on the coming down of the mandate.

The uniform decisions of this court afford a conclusive answer to the question. In the case of U. S. *v.* New York Indians, 173 U. S., 464, an appeal was sought to be prosecuted from a decree of the Court of Claims entered in obedience to a mandate of this court. The mandate of this court (l. c. 466) remanded the case to the Court of Claims with instructions which required of the Court of Claims the exercise of its discretion and judicial power on many questions, and authorized that court, among other things, to make "such deductions as may seem to the court below to be just and for such other proceedings as may be necessary and in conformity with this opinion." The Court of Claims, acting under the mandate, proceeded with the cause to judgment. The United States prosecuted a second appeal to this court. The court, after ascertaining that the Court of Claims had acted in accordance with the mandate, said:

> "This court has repeatedly held that a second writ of error does not bring up the whole record for reexamination, but only the proceedings subsequent to the mandate, and if these proceedings are merely such as the mandate command and are necessary to its execution, the writ of error will be dismissed, as any other rule would enable the losing party to delay the issuing of the mandate indefinitely. The Santa Maria, 10 Wheat., 431; Roberts *v.* Cooper, 20 How., 467; Tyler *v.* Magwire, 17 Wall., 253; The Lady Pike, 96 U. S., 461; Supervisors *v.* Kennicott, 94 U. S., 498; Stewart *v.* Salamon, 97 U. S., 361. In Stewart *v.* Salamon, *supra*, Mr. Chief Justice Waite observed:
>
> 'An appeal will not be entertained by this court from a decree entered in the circuit or other inferior court, in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is in effect our decree, and the appeal would be from ourselves to ourselves. If such an appeal is taken, however, we will, upon the application of the appellee,

> examine the decree entered, and if it conforms to the mandate, dismiss the case with costs. If it does not, the case will be remanded with appropriate directions for the correction of the error. The same rule applies to writs of error. This is not intended to interfere with any remedy the parties may have by mandamus.' Humphrey *v.* Baker, 103 U. S., 736; Clark *v.* Keith, 103 U. S., 464; Mackall *v.* Richards, 116 U. S., 45. The appeal will therefore be dismissed."

In the case of Illinois *v.* Illinois Central Railroad Company, 184 U. S., 77, Mr. Justice Harlan in delivering the opinion of the court cites an unbroken line of decisions of this court (l. c., 91), beginning with the earliest cases, and among them Sibbald *v.* U. S., 12 Pet., 488, from which the following is quoted with approval:

> "Whatever was before the court and is disposed of is considered as finally settled. The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; or give any other or further relief or review it upon any matter decided upon appeal for error apparent; or intermeddle with it *further than to settle so much as has been remanded.* After a mandate no rehearing will be granted and on a subsequent appeal nothing is brought up but the proceedings subsequent to the mandate."

Mr. Justice Harlan quotes approvingly the following from Roberts *v.* Cooper, 20 How., 467:

> "It has been settled by the decisions of this court that after a case has been brought here and decided and a mandate issued to the court below, if a second writ of error is sued out it brings up for revision nothing but the proceedings subsequent to the mandate. None of these questions which were before the court on the first writ of error can be reheard or examined on the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to

> endless litigation. In chancery, a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on its opinions, or speculate on chances from changes in its members. We can now notice therefore only such errors as are alleged to have occurred in the decisions on questions which were peculiar to the second trial."

Following this quotation, Mr. Justice Harlan in a footnote cites, in addition to the cases mentioned in the opinion, seventeen cases, beginning with the case of Martin *v.* Hunter's Lessee, 1 Wheat., 304, and ending with the case of New Orleans *v.* Citizens' Bank, 167 U. S., 371, and then says, with respect to the case then before the court (l. c., 93): "We therefore do not stop to consider, as the appellant insists we should do, whether this court erred in any particular in its opinion or judgment on the former appeal in respect of any matter then determined. Every matter embraced by the original decree of the Circuit Court and not left open by the decree of this court was conclusively determined, as between the parties, by our former decree, and is not subject to reexamination on this appeal."

It is conceded in the case at bar that the Circuit Court of Appeals decided all questions in the case in relation to the Colorado Company's claim and that the Circuit Court entered a decree in exact conformity with the mandate. As, then, there were no proceedings subsequent to the mandate, the decree of the Circuit Court is not reviewable. To say that an appeal may be prosecuted which does not present any question for review or decision involves a contradiction. We therefore submit that the orders allowing the appeal to this court and the Circuit Court of Appeals in the case at bar were void.

III.

The only question presented by this record is whether the Circuit Court committed error in entering a decree in accordance with the mandate, and this question may not appropriately be reviewed.

The Circuit Court performed no act except to enter the decree in accordance with the mandate, and that act is the only one complained of in appellant's assignment of errors (p. 32, appellant's brief, filed November 18, 1909). The appellant, on the coming down of the mandate, contended by what is designated as its amended petition (p. 597 *et seq.*, transcript) that the Circuit Court should disregard the mandate and accord appellant "the right under said decree to the equal use and benefit of the property, industrial and railroad facilities *from which said opinion of the Circuit Court of Appeals attempts to exclude it.*"

The question, then, is whether the Circuit Court committed error in refusing to reverse the decision of the Circuit Court of Appeals and in entering the decree in exact accordance with the mandate.

If the appeal is sustained, the decision of this court cannot proceed beyond answering that question, because that is the only question on which the Colorado Company asks a decision. The appeal challenges only the act of the Circuit Court in entering the decree in exact accordance with the mandate.

The Circuit Court had no discretion, but acted as a ministerial agent of the Circuit Court of Appeals. The decree did not represent the judgment or discretion of the Circuit Court, because the decree of that court was reversed. The Circuit Court in entering the decree according to the mandate did no more than it could have been compelled to do by mandamus.

We submit that the action of the Circuit Court in execution of the mandate does not present a question for review.

But the decree the Circuit Court entered was, as said in Stewart *v.* Salamon, in effect the decree of the Circuit Court of Appeals, and learned counsel in their oral argument and briefs complain only of the action of that court. May then the appeals allowed from the decree of the Circuit Court be considered as appeals from a decree of the Circuit Court of Appeals? This question was answered in the negative in the case of Webster *v.* Daly, 163 U. S., 155.

IV.

Our reason for not filing brief on the so-called merits.

On the oral argument our attention was called to our failure to file a brief on the merits, and we stated we would submit our case on our brief in support of the motion to dismiss and in opposition to the petition for a writ of certiorari, because the record failed to present "merits," or in other words, any question for review.

In an ordinary case set down for hearing on a motion to dismiss and on the merits, counsel, no doubt, could not with due deference to the court, or the interests of his client, prejudge the decision of the court by submitting his cause on the motion to dismiss alone. To dispel a possible erroneous impression with respect to the propriety of counsel for the appellee resting their case on their brief in support of the motion to dismiss and in opposition to the petition for writ of certiorari, we wish here to call attention to the posture of the litigation at bar, with a view of showing that we were obliged from the necessities of the case to pursue that course and could not with propriety have pursued any other.

What question could we have presented or discussed in a brief on the merits? We have seen that the appeal challenges the action of the Circuit Court in entering the decree appealed from in accordance with the mandate of the Circuit

Court of Appeals. If the propriety of the action of the Circuit Court in entering that decree constitutes the merits of the case, then we have covered the merits in our brief on file, wherein we have endeavored to show that the action of the Circuit Court was not only free from error but was in compliance with an order it was in duty bound to execute.

May it be said that we could have briefed the questions decided by the Circuit Court of Appeals? It should be borne in mind that the decision of the Circuit Court of Appeals was adverse to us. At the end of a long drawn out litigation that court decided against our contentions. When the opinion was handed down, we examined the decisions of this court with a view of applying for a writ of certiorari in order to have the case reviewed here, but we concluded, as learned counsel for the Colorado Company seems to have concluded (p. 9, brief in support of petition for certiorari), that in view of the circumstance that the controversy was between private parties and involved private rights, and the policy of the court as announced in the case of C. and N. W. R. Co. *v.* Osborne, 146 U. S., 354, and other similar cases, we could not hope to succeed. If the case had been removed from the Circuit Court of Appeals to this court, then we could have urged here our contentions made in that court. The decision of that court, however, was suffered to become final. It is obvious, then, we could not now present to this court for review our contentions which passed into judgment in that case, and as that judgment was against us we think it equally obvious we ought not to be asked to defend it.

As we were concluded by that judgment from renewing our contentions made in the Circuit Court of Appeals, the Colorado Company must have been concluded thereby from renewing its contentions.

In view of the many decisions of this Court directly in point, we submit we could not with due deference to the court, have proceeded on the assumption that the decree of the Circuit Court of Appeals did not conclude the litigation.

V.

What the record shows with respect to the claim that the Colorado Company paid "its share" of the cost of the construction of the industrial tracks.

In complying with the request of Mr. Justice Day, we will subdivide the matter and will first consider what the record shows with respect to the Colorado Company having paid "its share" of the cost of the construction of the industrial tracks.

On the oral argument learned counsel for the Colorado Company was repeatedly asked the direct question whether the record showed that the Colorado Company paid its share of the cost of the industrial tracks. Learned counsel replied to these questions specifically by affirming that the record showed that the Colorado Company paid its share of the cost of these tracks. While we did not wish to discuss the contentions decided by the Circuit Court of Appeals, we did not think the answers of learned counsel justified the imputation they naturally carried, and as they were unsupported by the record we challenged their accuracy.

Learned counsel in their brief, filed November 18, 1909, page 16, state that the Colorado Company paid "its proportion of all the repairs and of all the maintenance of all such property, including the yards and other property (Rec., 26, partial agreed statement, par. 12; evidence Pryor, Rec., 508, 509, 510, 511; petition in Luke case, Rec., 440, 475), and whenever anything was paid by the Wabash Company upon account of any industrial track between 18th street and the park, *no matter where located or with what part of the right of way it was connected,* the Colorado Company was charged with, and paid under the decree, its proportion of the amount paid on account thereof by the Wabash Company (Second agreed statement, Rec., 347, 360; depositions Tay-

lor, Rec., 320-26; Haynes, 328-33; Hines, 333-36; Decker, 336-38).

The stipulations mentioned do not refer to the industrial tracks, as learned counsel concede on page 115 of their brief in the following words: "As to all the property except tracks leading to private industries, as to which the matter was left open to proof, the parties stipulated, etc." In the following paragraph on the same page they state: "As to the industrial tracks, *i. e.*, the tracks leading to private industries, the parties failed to agree (Rec., 26, 27, par. 12-14). These industrial tracks were (Rec., 27, par. 14) constructed under a form of contract (Rec., 313), by which the industry paid in full for the cost of everything except rails, switches, frogs, bolts, and splices, and as to those the industry paid in the form of six per cent interest upon the cost."

On page 313 of the transcript will be found a sample agreement, under which the industrial tracks were constructed. This agreement was made between the Wabash Railroad Company and the Berry Horn Coal Company. A perusal of the agreement will show that the Wabash Company furnished the materials for the construction of the industrial tracks and charged the industry 6 per cent interest on the cost thereof and that the industry agreed to pay for the repair and maintenance of the tracks. This instrument enables us to definitely say that the Wabash Company furnished the material for the industrial tracks and that the industries obligated themselves to pay the cost of repairs and maintenance. This matter would seem to dispose of the contention that the Colorado Company paid its share of the cost of the industrial tracks, because by the agreement the industry pays 6 per cent on the value of the materials furnished by the Wabash Company, which makes the Wabash Company whole, so in effect neither of the railway companies were burdened with the cost of the industrial tracks.

We will now refer to the pages of the record referred to in the first excerpt above quoted from appellant's brief to determine what the witnesses testified to. The first reference is to the evidence of Pryor (p. 508 *et seq.* of the record). Mr. Pryor's testimony begins on page 507, where he states that he was in charge of the accounts of the Wabash Company and was familiar with the accounts and all matters in connection with the accounts between the two companies. He further testified "that all expenditures in connection with the construction and maintenance of such switches (meaning industrial tracks) were to be kept entirely separate and not to be taken into the bills against the St. Louis, Kansas City and Colorado Road," that the bills for the construction and maintenance of the industrial tracks were paid directly by the Wabash Company and under his instructions were not to be charged to the Colorado Company or any other company; that if (508) any such items appeared in the bills of the Colorado Company they were placed there by mistake or oversight or misunderstanding of the clerks who made up the bills. He further testified that the Colorado Company paid its rental under the decree, but did not state any fact inconsistent with his testimony above in respect to the cost of the construction and maintenance of the industrial tracks.

We refer to the deposition of Taylor (pp. 320-26, Transcript). Taylor testified that he worked for the Wabash Company from 1898 to July 11, 1901, as a track man; that he and his colaborers of the Wabash Company worked on the main tracks, side tracks and industrial tracks, but he did not testify to any fact in regard to who paid the cost of the construction or maintenance of any of the tracks.

We refer to the deposition of Haynes (pp. 328-33, Transcript). He testified that he was general road master of the Wabash Company and looked after the laboring gangs and work trains; that the employees under him repaired various tracks, but he stated no fact with respect to who paid for the construction or maintenance of the industrial tracks,

We refer to the deposition of Hines (pp. 333-336). He testified (p. 333) he was locomotive engineer of the Colorado Company; was familiar with the property used by the two companies and described the nature of the switch stocks or stands, but did not testify to any fact with respect to who paid for the construction or maintenance of the industrial tracks.

We refer to the deposition of Warren Decker (pp. 336-338, Transcript). He testified he was locomotive engineer (p. 336) of the Colorado Company and described the character and kind of switch stands used, but did not testify to any fact with respect to who paid for the construction or maintenance of the industrial tracks.

We have now exhausted the references made to the testimony of witnesses in the excerpt first above quoted from appellant's brief and have not found a single fact justifying the contention that the Colorado Company paid any part of the cost of the industrial tracks.

Beginning on page 118 of appellant's brief, a number of industrial tracks are treated separately. It will be noted that it is not claimed that the Colorado Company paid anything in connection with tracks 1 and 2. It is stated, however, that the Colorado Company paid its share of the cost of repairing track No. 3, and reference is made in that connection to page 584 of the transcript (memo. 5 of Tate's Exhibit 5). Referring to the transcript, it will be observed that, the Wabash Company included in its bill against the Colorado Company for expenditures on the joint section for May, 1891, an item of $29.85. Included in this item was an item of $11.04 for repairs to "Car-wheel switch," being the industrial track designated in appellant's brief as track 3. The Colorado Company paid its wheelage proportion of this item. The wheelage proportion of the two companies was 87.71 per cent Wabash, 12.29 per cent Colorado, as stated on page 15 of appellant's brief. The Colorado Company's wheelage pro-

portion of the $11.04 was less than $1.50. By examining the references to the record we have made, it will be observed that the track men of the Wabash Company who kept the joint section in repair were sometimes detailed to work on the industrial tracks, and that under the contract between the Wabash Company and the industry the Wabash Company kept the industrial tracks in repair and then billed against the industry for reimbursement. Time does not permit an examination of the record with a view of ascertaining whether the car-wheel company reimbursed the Wabash for this item or whether the Wabash reimbursed the Colorado Company.

Referring again to appellant's brief (pp. 118-19), we find it is claimed that the Colorado Company paid its proportion of the cost of repairs to track 4 in April, 1890, and in February, 1895. With respect to the first item we are referred to deposition of Wabash Railroad Company (Rec., 583, Memo. 3 of Tate's Exhibit 5), which shows that the sum of $32 was expended by the Wabash Company for repairs to track No. 4. It also appears that the total of Kelsey's check-roll for April, 1890, was $535.80, and that the Wabash bill for work on the joint section for that month was $535. While it appears that the Colorado Company paid the bill, it also appears that the bill did not include the $32 item of repairs to track No. 4. The bill was for the amount of Kelsey's check-roll for April, and did not include the item of $32.00.

Referring to the transcript with respect to the repairs made to track 4 in February, 1895, we turn to page 355, where we find that it was agreed that the Wabash included an item of $32.62 in its bill for that month for labor rendered in making repairs to the track referred to as No. 4, and that the Colorado Company paid its wheelage proportion, $4.85.

Track No. 5 is next referred to in appellant's brief, and it is said this track was repaired in April, 1890, and also in February, 1895. The reference with respect to the

April repairs is page 583, Memo. 3 of Tate's Exhibit 5. Turning to the reference, we find it to be the same reference made with respect to track 4. Referring to the repairs made in February, 1895, to track 5, we are referred to page 355, subdivision 16, transcript. An examination will disclose that reference to be the same item of $4.85 previously referred to in connection with the repairs on track 4, February, 1895. The references made in appellant's brief in regard to repairs made to tracks 6 and 7 (p. 119) are precisely the same references made in connection with repairs to track 4. No useful purpose would be served by pursuing an inquiry into each one of the tracks referred to in appellant's brief (pp. 118-29, incl.).

The pages of the record referred to in appellant's brief (pp. 118-29) will disclose the sums paid by the Colorado Company for repairs to industrial tracks. The amounts paid were trifling and scattered through a long period of time. It also appears in every instance that the amount paid was on account of the labor of the trackmen, who made repairs to all the tracks of the Wabash Company. Under these circumstances it was very difficult to separate the repairs to industrial tracks from repairs to other tracks. In any event, the industries reimbursed the Wabash Company or were obliged to do so under the contract, and if the Colorado Company paid any of the items, it was entitled to reimbursement from the Wabash when the Wabash collected from the industries, and presumably it has been reimbursed, although we have not examined the record with respect to that point.

We have examined the record as carefully as our limited time would permit and have failed to find any evidence tending to show that the Colorado Company contributed any sum whatever toward the cost of construction of any of the industrial tracks, and, as above said, the contribution of the Colorado Company to the cost of maintenance was confined to scattered items for labor performed but not for material furnished. An examination of the references made

to the record by appellant will show that the Colorado Company made no contribution whatever towards many items the Wabash Company paid for repairs to the industrial track.

VI.

Industrial tracks were operated under an agreement entirely apart from the decree.

It is not claimed that the decree obligated the Wabash Company to move the cars of the Colorado Company. The Colorado Company has the right to use with its own engines and cars the tracks embraced within the decree. It is conceded by appellant on page 130 of its brief that the switching of the Colorado Company was done by the Wabash Company. It is there said: "Some confusion is created by a reference in the record to the services charged for switching, which has no relation to the rental paid or the cost of maintaining the property. The Colorado Company had no switch engines or cars and the Wabash Company did this work for hire (Rec., 27, par. 15). Mr. McGee says (Rec., 514–15) and Mr. Emerson denies (Rec., 489–90) that this work was done under a verbal agreement to be paid for in proportion to the number of cars switched, no matter whether the switching was done on the main, side or industrial tracks, which was different from the decree, where the wheelage was according to the wheels passed over the main track or parts thereof."

The evidence of Mr. McGee, the general superintendent of the Wabash Company, with respect to the separate arrangement, begins on page 513 of the transcript. He testified that shortly after the decree of 1886 was rendered the superintendent of the Colorado Company took up with him and Charles M. Hayes, then general manager of the Wabash Company, the subject of making an arrangement to cover the switching of the Colorado Company; that it was

finally agreed the Wabash Company would do the switching, and the two companies would share on a wheelage basis the expense of operating and maintaining the yards and industrial tracks, and other facilities that were used in connection with the switching (pp. 514-15). Mr. McGee gave his recollection of the arrangement. Mr. Emerson denied that such an arrangement was made, but it is obvious he was in error, because there must have been some arrangement between the two companies covering the switching. The decree did not cover that matter. By referring to page 27 of the transcript it will be observed that it was stipulated in paragraph 15 that the Wabash Company performed the switching for the Colorado Company and rendered separate bills for that service. By separate bills we mean bills separate from the rental and other items the Colorado Company was required to pay under the decree. Some agreement between the parties must have been made with respect to this matter. Mr. McGee's evidence with respect to the maintenance of the yards, switches, etc., indicates that the arrangement was that the maintenance of all the tracks used in the switching of cars should be borne on a wheelage basis. No doubt the parties referred to the matter in general terms and did not have in mind any particular distinction with respect to the nature of the tracks or the provisions of the decree.

Respectfully submitted,

WELLS H. BLODGETT AND
JAMES L. MINNIS,
Solicitors for Appellee, Wabash Railroad Company.

In the Supreme Court of the United States

October Term, 1908.

THE ST. LOUIS, KANSAS CITY AND COLORADO RAILROAD COMPANY, APPELLANT,

v.

WABASH RAILROAD COMPANY AND CITY OF ST. LOUIS, APPELLEES.

No. 253.

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS.

1. *The Appeal and Motion to Dismiss.*

(*a*) The Circuit Court for the Eastern District of Missouri, upon a mandate and opinion (152 Fed. Rep., 863) of the Circuit Court of Appeals for the Eighth Circuit, entered a decree that appellant, herein called the Colorado Company, was not entitled to the use of certain industrial tracks of the Wabash Railroad Company in St. Louis. This holding refused to give effect to a decree entered by Mr. Justice, then Circuit Judge, Brewer

(Central Trust Co. *v.* Wabash, St. L. & P. R. Co., 29 Fed. Rep., 546) and here affirmed (Joy *v.* St. Louis, 138 U. S. 1), specifically enjoining the Wabash Company to permit such use. From such decree this appeal was taken to this court, as was also one to the Circuit Court of Appeals. The Wabash Company has filed a motion to dismiss the appeal here upon the ground that it could not be taken directly to this court.

(*b*) To avoid any possible question as to which appeal should be prosecuted, appellant filed its petition for a writ of certiorari, to remove here its appeal taken to the Circuit Court of Appeals. This case is numbered 631. Such was, in Pullman's Palace Car Co. *v.* Central Transportation Company, 171 U. S., 138, held to be the proper course to be pursued if there were any doubt as to the jurisdiction of this court over the appeal taken to it. The motion to dismiss and the petition for certiorari in case No. 631, with the briefs in support thereof and opposed thereto, are to be submitted at the same time.

2. *Briefs for and Against the Motion.*

Appellee has submitted its motion to dismiss upon its brief filed in opposition to the petition for certiorari in case No. 631. As the brief in support of that petition also fully presents the views of appellant upon the motion to dismiss and points out wherein there is here involved a constitutional question, that brief is likewise submitted as appellant's brief upon the motion to dismiss. This brief may also be treated as the brief in reply in case No. 631.

3. *Ground of the Appeal to this Court.*

The appeal was taken to this court upon the ground

that due credit was not given by an inferior court to the decree of the Supreme Court (Petitioners' Brief in No. 631, pp. 10–12), whereby a constitutional question was presented. This because article III, sections 1 and 2, and article VI of the constitution impliedly require (Embry *v.* Palmer, 107 U. S. 9), the same credit to be accorded to a decree of the federal court, as is by section 1, article IV required to be given to one of the state courts. This doctrine is especially applicable here because the constitution in giving this court *supreme power* necessarily implies that its decree cannot be impaired by an inferior court. There thus appears a constitutional inhibition in line with the doctrine stated by Mr. Justice Brewer (Leadville Coal Co. *v.* McCreery, 141 U. S. 475) that no court can annul the decree of another.

4. *Did the Constitutional Question Come into the Case Too Late for the Appellant to Have the Advantage Thereof?*

(*a*) That a constitutional question exists is not seriously denied by counsel. The position taken is that by reason of some peculiarity of the Circuit Court of Appeals system, appellant has been deprived of the right to present the same.

(*b*) The case is this: A decree entered upon the circuit by Mr. Justice, then Circuit Judge, Brewer (29 Fed. Rep., 546) was here affirmed (138 U. S. 1), thus becoming the decree of this court. This gave to the appellant the right to the equal use of all the railroad property of the Wabash Company between 18th Street and Forest Park in St. Louis. After over fifteen years continuous use for *all* purposes, the Wabash Company claimed that the use to which the Colorado Company was limited, was a

through uninterrupted passage over the tracks. No other controversy then existed. (Petition Rec., pp. 10–11, par. 10; answer, Rec. 17, par. 10). Counsel are mistaken in their statement to the contrary. To settle this controversy the Colorado Company filed a petition to enforce the original decree of this court. After a hearing the Circuit Court decided (144 Fed. Rep., 476) that controversy for the Colorado Company but held that the use was limited to a strip of land thirty feet in width, a question for the *first* time discovered by the Circuit Court. Upon appeal to the Circuit Court of Appeals, that decree was reversed (152 Fed. Rep., 863; Rec., 620–621), the holding by a divided court being that the Colorado Company was entitled to the use of all the property upon land owned by the Wabash between the limits, but not to the use of the industrial tracks owned by it but located upon land of others, a distinction never before suggested by anyone. The decree of reversal (Petitioners' Brief in Case No. 631, p. 10) required much action by the trial court, so that (*id.*) it was not final in the sense that authorized a review by certiorari or by appeal had the case been otherwise appealable. This because there was a reversal, not as claimed by counsel because private interests were involved. When the case reached the Circuit Court upon mandate, the *other* questions left open by the Circuit Court of Appeals (152 Fed. Rep., 849, 863; Rec., 619–620) for *new* action, were not presented and a decree as to the industrial tracks was entered in accordance with that portion of the opinion of the Circuit Court of Appeals relating thereto. Before this was done, however, by *consent* of parties and *leave of court* (Rec., 597) the Colorado Company filed an amended petition setting forth that to so exclude it from the use of the industrial tracks and

follow the decision of the Circuit Court of Appeals would impair a decree of this court and thus deprive it of a constitutional right.

Two appeals were then prosecuted, one No. 253 to this court and the other to the Circuit Court of Appeals which is now sought (Case No. 631) to be here removed by certiorari, the petition therefor being submitted with the motion to dismiss Case No. 253.

5. *Remedies to which Appellant was Entitled.*

(*a*) Had the decision of the Circuit Court of Appeals upon the *first* appeal been one of affirmance, the case could have been brought here by certiorari. The case having been reversed and remanded for many purposes certiorari *would not lie.* That decision then was not reviewable here at that time.

(*b*) The *second* appeal to the Circuit Court of Appeals, it is with force claimed, must be there dismissed (Stewart *v.* Salamon, 97 U. S., 361), because the former opinion is the law of the case. That rule does not, however, apply to this court and is no answer to a petition for certiorari (Panama *v.* Napier Shipping Co., 166 U. S., 280).

(*c*) If, however, a constitutional question was in time presented by the amended petition, then an appeal lies to this court. If doubt exists, it can be eliminated by granting the certiorari in compliance with the practice adopted in Pullman's Palace Car Co. *v.* Central Transportation Company, 171 U. S. 138. In any event the motion to dismiss should not be summarily sustained when it can as well be considered at final hearing in the light of oral arguments.

6. *The Constitutional Question was Presented the First Time it Could have Been.*

(*a*) Counsel's position seems to result in this: The law of the case binding the Circuit Court of Appeals prevents that court from entertaining a *second* appeal; hence, the last decree entered by the Circuit Court cannot be elsewhere reviewed. If, however, no inferior court can even by construction constitutionally impair the force of a decree here made, there must be somewhere a method by which this court can review the case in which the attempt is made. So if the former decision of the Circuit Court of Appeals is not, as against this court upon certiorari, the law of the case, is decided in Panama *v.* Napier Shipping Co., 166 U. S. 280, it cannot be said to be the law of the case as against this court upon an appeal presenting a constitutional right timely invoked.

(*b*) It is true that when the original petition to enforce the decree of December 31, 1886, was filed no constitutional question was involved, because up to that time no one could say that any inferior court would refuse to accord full faith and credit to a decree of this court. When a decision to such effect was made by the Circuit Court of Appeals, then for the *first* time a constitutional question became involved. The case could have been removed here by certiorari if the decree had been one other than of reversal. Being one of reversal, and the trial court directed to enter in one respect a decree impairing that of the Supreme Court, the constitutional right could for the *first* time only be denied by the actual entry of the decree in the trial court. Accordingly, by consent of court and counsel, an amended intervening petition was filed before the decision, raising the constitutional question involved. This being by *consent* of

parties, and *permitted by the trial court*, must be said to have been strictly in accordance with the practice of that court, and hence raised the question in time with the same effect as if presented when the intervening petition was filed.

This presented a distinct constitutional question, arising upon the petition for relief, and necessarily justified an appeal to this court.

Respectfully submitted,

W. F. EVANS,
M. A. LOW,
FRANK HAGERMAN,
Solicitors for Appellant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

ST. LOUIS, KANSAS CITY & COLORADO RAILROAD COMPANY,
Appellant,

CITY OF ST. LOUIS AND THE WABASH RAILROAD COMPANY,
Appellees.

No. 253.

MOTION OF WABASH RAILROAD COMPANY, APPELLEE, TO DISMISS APPEAL.

Now comes the Wabash Railroad Company, one of the appellees, and moves the Court to dismiss the above entitled cause, and as reasons therefor assigns the following:

I.

This Court has not jurisdiction of this cause, that is to say, the decree from which this appeal was allowed, was entered in exact accordance with a mandate handed down by the United States Circuit Court of Appeals for the Eighth Circuit, on a previous appeal prosecuted by appellant, as appears from said mandate (page 621, *et seq.*, Transcript) said decree (p. 625, *et seq.*, Transcript) the opinion of the Court (page 603, *et seq.*, Transcript) and the order allowing the appeal (p.

226, Transcript); and it further appears that no proceedings subsequent to the entry of said decree were had in the Circuit Court (p. 626 Transcript). (See p. 4 of Appellant's Petition for writ of *certiorari* filed in connection with this motion wherein the above facts are admitted.)

II.

The jurisdiction of the cause in which the decree appealed from was rendered depended entirely upon the opposite parties to the suit or controversy being citizens of different States.

(See p. 9 appellant's brief in support of its petition for writ of *certiorari* submitted with this motion where the above facts are admitted.)

III.

The cause below did not involve the construction or application of the Constitution of the United States or the constitutionality of a law of the United States or the validity or construction of any treaty made under its authority, or a State law claimed to be in contravention of the Constitution of the United States or the jurisdiction of the court below. (See application and motion on which suit was founded, p. 3 *et seq.*, Transcript, and mandate p. 621 *et seq.* Transcript and decree, 925 *et seq.*, Transcript, and appellant's petition for a writ of *certiorari* and brief in support.)

Respectfully submitted,

William Baldwin and
James L. Minnis

Solicitors for Appellee, Wabash Railroad Co.

BRIEF IN SUPPORT OF MOTION.

This motion will be submitted in connection with appellant's petition for a writ of *certiorari* and brief in support, and our brief in opposition, wherein the questions presented by this motion are fully considered. We therefore respectfully request the Court to consider, in connection with this motion, said petition and briefs.

Walter H. Blodgett and
James L. Minnis
Solicitors for Appellee, Wabash Railroad Company.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 57.

THE ST. LOUIS, KANSAS CITY AND COLORADO RAILROAD COMPANY, APPELLANT,

v.

WABASH RAILROAD COMPANY AND CITY OF ST. LOUIS, APPELLEES.

APPELLANT'S BRIEF.

STATEMENT.

I.

THIS APPEAL, MOTION TO DISMISS IT, AND THE PETITION FOR CERTIORARI IN CASE NO. 301 ARE TO BE CONSIDERED TOGETHER.

(1) The Circuit Court for the Eastern District of Missouri, upon a mandate (Rec. 593-596, 621-624) and opinion (Rec. 601-621, 81 C. C. A. 643, 152 Fed. Rep. 849) of the Circuit Court of Appeals for the Eighth Circuit, entered a decree (Rec. 624-625) that appellant was not entitled to the use of certain industrial tracks of the Wabash Railroad Company in St. Louis. This holding refused to give effect to a decree entered by Mr. Justice, then Circuit Judge, Brewer (*Central Trust Co.* v. *Wabash St. L. & P. R. Co.*, 29 Fed. Rep. 546,) and here affirmed (*Joy* v. *St. Louis*, 138 U. S. 1, 34 L. Ed. 843) specifically enjoining the Wabash Company to permit such use. From such ruling this appeal was taken to this court, as was also one to the Circuit Court of Appeals, the latter being taken as a matter of precaution, a course frequently pursued (*Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, 43 L. Ed. 108, 111, 112; *Burton* v. *U. S.*, 196 U. S. 283, 49 L. Ed. 482; *Pierce* v. *Creecy*, 208 U. S. 616, 52 L. Ed. 646, 210 U. S. 387, 52 L. Ed. 1113). The Wabash Company filed here at last term, a motion to dismiss this appeal upon the ground that it could not be taken directly to this court.

(2) To avoid any possible question as to which appeal should be prosecuted, appellant filed its petition for a writ of certiorari, to remove here its appeal taken to the Circuit Court of Appeals. This case is numbered 301. Such was, in *Pullman's Palace Car Co.* v. *Central Transportation Company*, 171 U. S. 138, 43 L. Ed. 108, 111, 112, held to be the proper course to be pursued if there were any doubt as to the jurisdiction of this court over the appeal taken to it. The motion to dismiss and the petition for certiorari in case No.

301, with the briefs in support of and opposed to each, were submitted at the same time and the court made an order continuing both to be heard with this case upon the merits. The records in the two cases from pages 3 to 625 inclusive are exactly the same. The only difference in the two records is in the designation of the Courts to which the respective appeals were taken.

(3) The Wabash Company submitted its motion to dismiss upon its brief filed in opposition to the petition for certiorari in case No. 301. As the brief in support of that petition also fully presented the views of appellant upon the motion to dismiss and pointed out where there is here involved a constitutional question, that brief was likewise submitted as appellant's brief upon the motion to dismiss. A short brief in reply was filed. It is, therefore, unnecessary to now deal with anything but the merits of the case, as those briefs (already filed) cover the other questions reserved for hearing at final argument.

II.

CAUSE PENDING BELOW AND SOUGHT TO BE REVIEWED EITHER BY APPEAL OR CERTIORARI.

(1) Appellant as an intervenor, in a cause pending below, there sought to enforce (Petition, Rec. 3-13) a decree (Rec. 4-7) in its favor entered by Mr. Justice, then Circuit Judge Brewer, in the United States Circuit Court for the Eastern District of Missouri, December 31, 1886 (29 Fed. Rep. 546) afterwards affirmed here (*Joy* v. *St. Louis*, 138 U. S. 1, 34 L. Ed. 843)

against the Wabash Railroad Company, requiring the latter to accord to intervenor the equal use of its entire "right of way, tracks, side-tracks, switches, turnouts, turntables and *other terminal facilities*" in St. Louis between the north line of Forest Park and 18th Street. The court had, upon the insistence of the Wabash Company, held that the compensation previously fixed by the master should be increased because the Colorado Company, by virtue of the decree, obtained the rights to the use of *all the terminals*, including industrial tracks. For over fifteen years such use had been accorded as required by the decree, being for the first time denied on May 7, 1902. That decree will, for convenience be called herein the "Old Decree."

(2) The answer (Petition, Rec. 10, 11, par. 10. Answer, Rec. 17, par. 10) of the Wabash Company to this intervention was that while the Colorado Company could use all the property, it could make use of same only for through uninterrupted passage. Thus the controversy was quite narrow, i. e., whether appellant was limited in its use to the continuous and uninterrupted passage of its trains. After an extended trial (Rec. 23-592), a decree (Rec. 593, 594, 597) was entered upon this petition for enforcement denying the claim of the Wabash Company, but *limiting* the use of the appellant, under the decree, to that part only of the right of way upon a strip 42 feet wide through Forest Park and 28 to 30 feet wide from the Park to 18th street, the opinion of Judge Rogers, the trial judge (144 Fed. Rep. 476) being that neither Mr. Justice Brewer, who entered the original decree, nor this court in affirming the same, intended their *general* language in giving to appellant the equal use of the *en-*

tire right of way and *all* terminal facilities, to apply to more than such narrow strip and *part* thereof. This was in reality a new discovery and not the claim asserted by the Wabash Company in its answer.

(3) An appeal was then taken to the Circuit Court of Appeals for the Eighth Circuit, to which, in the absence of a jurisdictional or constitutional question the case had to go (*Mason v. Pewabic Mining Co.*, 153 U. S., 361, 38 L. Ed., 745) which reversed (Rec 624) and remanded the case "with instructions to render a decree not inconsistent with the views" expressed in the opinion of Judge Sanborn (Rec. 601-621, 152 Fed. Rep., 849-856), that the intervenor was entitled to the equal use of the *entire* strip of land between the east line of the Park and 18th street *owned* or the right to use which had been acquired by the Wabash Company when the "Old Decree" was rendered, and *all* terminal facilities thereon, but was "not entitled to the use * * * of any * * * industrial or railway facilities of the Wabash Company" *not on that particular strip*, a limitation never before suggested by anyone. Judge Hook vigorously dissented (Rec. 620, 621, 152 Fed. Rep., 863) from this exception, but concurred in the rest of the opinion. This being a decree of reversal where private interests were involved and not one which was final, the case could not have *then* been brought here by certiorari (*C. & N. W. R. Co.* v. *sborne*, 146 U. S. 354, 36 L. Ed., 1002; *Forsythe* v *Hammond*, 166 U. S., 506, 574, 41 L. Ed., 1095, 1098; *Taylor* v *Louisville etc., R. Co.*, 172 U. S. 648, 43 L. Ed., 1182) nor by appeal (*MacLeod v. Graves*, 79 Fed. Rep., 84; *Lubin* v. *Edison*, 195 U. S., 624, 49 L. Ed., 349) so intervenor was remediless until a new decree was entered.

(4) When the mandate (Rec. 593-596) reached the Circuit Court, appellant by leave of court and *consent* of parties (Rec. 597) filed an amendment to its petition (Rec. 597-600) setting up the action aforesaid, the mandate of the Circuit Court of Appeals and averring that neither the Circuit Court of Appeals not the Circuit Court had any right to exclude it from the use of the industrial tracks of the Wabash Company beyond the limits of the land owned by it, and to enter a decree so doing would fail to give full faith and credit to that entered by Mr. Justice Brewer and the mandate of affirmance from this court, all contrary to sections 1 and 2 of article III and article VI of the Constitution of the United States, it having been said in *Embry* v. *Parker*, 107 U. S. 9, 27 L. Ed. 346, 349, that these sections required to be accorded to a decree of a federal court, the same full faith which must be given under section 1, article IV to one of the state courts.

(5) The Circuit Court, by Judge Rogers, then entered a new decree (Rec. 624, 625) giving appellant the use of all the property upon the particular strip of land the title or use of which had at the time of the entry of the "Old Decree" been acquired by the Wabash Company between Forest Park and 18th street, but excluding it from the use of its industrial tracks between said points on land *not so acquired*, holding that if any parts of any of the industrial tracks were between such points and owned and used by the Wabash Company, yet not located upon the specific strip of land acquired by the company, (although adjacent thereto, connected therewith, and only usable because thereof) they were not then within the benefit of the decree. From this decree an appeal (Rec. 626 in Case No. 301) was for the

second time, taken to the Circuit Court of Appeals, to remove which a petition for certiorari is here pending as No. 301, to be argued here with this case.

(6) This appeal (Rec. 626) was also taken directly to this court upon the ground that full faith and credit had not been given to its decree as required by sections 1 and 2 of article III of the Constitution. There being a possible doubt as to which appeal should be prosecuted, this court being the one which should finally decide the case, the course sought to be adopted was to follow the practice pursued in *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, 43 L. Ed. 108, 111, 112, by filing here a petition for a certiorari to bring up the other record in the hope that this court would grant this petition and hear both appeals at the same time.

With these preliminary suggestions we turn to the merits of the case.

III

CASE UPON MERITS.

(1) THE CASE APPEALED.

In 1886 there was pending in the Circuit Court for the Eastern District of Missouri a consolidated railroad mortgage foreclosure and receivership case of the Central Trust Company, et al., vs. Wabash, St. Louis & Pacific Railroad Company, et al., numbered 2357 and 2464, (herein for convenience called the "Main Case".) In that case the St. Louis, Kansas City & Colorado Railroad Company, (herein called the "Colorado Company,") filed a petition of intervention (Rec. 31-37) afterwards amended (Rec. 154-160), seeking by virtue

of certain contracts made with the public, to enforce a right to use with its trains, upon fair terms, the entire right of way of the Wabash Company in St. Louis, between the north line of Forest Park and 18th street. Upon December 31 1886, there was entered thereon a decree (Rec. 292-296) herein called the "Old Decree", in favor of the Colorado Company which, upon appeal, was affirmed (Rec 25, par. 10; 138 U. S. 1, 34 L. Ed. 843) and under which the property has since been continuously used. In 1902 a difference arose between the parties as to the character of the use to which the Colorado Company was entitled. A petition (Rec. 3-13) was then filed by it to construe and enforce the decree. After answer (Rec. 13-19) and replication (Rec. 22, 23), proofs were offered (Rec. 23-589), consisting mainly of stipulations and records hereinafter set forth in detail, and a decree (Rec. 593, 594) entered to the effect that while the character of the use of the Colorado Company was as it contended, yet that such use was limited to a portion of such right of way thirty feet in width. From this decree the Colorado Company appealed (Rec. 595) to the Circuit Court of Appeals, where there was a reversal (Rec. 595-596; 601-621, 81 C. C. A. 643, 152 Fed. Rep. 849, 863), the entire court holding that there was no such limitation in width, a majority also holding that there was no right to the use of such portions of the industrial tracks as were not located upon the particular strip of land acquired on or before the date of the entry of the "Old Decree." Thereafter, a new decree was by the Circuit Court entered (Rec. 624-625) in accordance with that opinion. To reverse this last decree is the object of this appeal.

(2) OLD DECREE SOUGHT TO BE ENFORCED.

The "Old Decree" (Rec. 47, 292-296-442) so sought to be enforced gave to the Colorado Company in most sweeping terms the right to *fully* use upon equal terms *all* of the "right of way, tracks, side-tracks, switches, turnouts, turntables and *other terminal facilities*" owned by the Wabash Railroad Company, (herein called the "Wabash Company") "between the north line of Forest Park and 18th street in St. Louis" or Tayon avenue, this being "the west end of the Union Station in St. Louis." The land consisted of a strip of varying and irregular width, ranging up to more than 200 feet in places, upon which there were located (at the time of the entry of the "Old Decree") main and side tracks, switches, turntables, turnouts and such other terminal facilities as in a city are usually located on a railroad right of way. Between the same points, partly upon and leading from this land, there were short tracks to and from private industries along and adjoining the same, furnishing to such industries their only railroad outlet connecting them with the main tracks, and constituting part of the "terminal facilities" of the Wabash Company. This property was shown in detail upon two maps, one, Chart A (Rec. 591) used in the Main Case (Rec. 50, 51, 86), and the other, Exhibit "D" (Rec. 592) prepared for this case (Rec. 27, par. 14) showing the same land and the tracks as they were at the time of the trial below, the only changes since the entry of the decree in the main case being the addition of some industrial tracks, the date of the construction thereof being shown thereon and hereafter enumerated (Argument, Div. VII).

(3) RIGHTS AS HERETOFORE EXERCISED WERE AS CLAIMED BY THE COLORADO COMPANY.

The right sought to be enforced, i. e., the equal right to use the *entire* right of way, *regardless of width*, together with each and every part of the industrial tracks, and all terminal facilities was, by the Colorado Company continuously exercised, and the rent therefor fully paid, from the time of the entry of the "Old Decree" in the Main Case on December 31, 1886, until May 7, 1902, when the Wabash Company *for the first time* claimed (Motion, Rec. 10-11; Answer, Rec. 17, 18) that the Colorado Company had no right, under that decree, "except to use the main track * * * for passing trains and passing tracks *for the sole purpose of permitting trains to pass each other.*"

(4) CONTENTION OF THE PARTIES.

That such was, when the motion was filed, the *sole* issue between the parties is plain. The motion (Rec. 10-12) averred that on May 7, 1902, the Wabash Company for the first time claimed that the use to which the appellant was entitled was only for passing trains and that the tracks could not be used for any other purpose, not even to reach industrial tracks. The answer (Rec. 17, 18) admitted the controversy to be so limited to the use which appellant could make of the property.

There was *then* no difference between the parties as to the *width* of the right of way, and never any pretense that the right of way was limited in *width*, nor, until the Circuit Court of Appeals decided the case, that the industrial tracks could not be used, for up to that time the contention had been only that the regular

Wabash tracks could not be used to reach the industrial tracks, because they could only be used for continuous passage.

(5) How the Question was Presented and View Taken by the Trial Judge.

Under the foreclosure decree in the Main Case, the property was acquired by the Wabash Western Railway Company, which was required to, and did, enter its appearance therein (Rec. 317, 318), and thereafter consolidated with the Wabash Railway Company (Rec. 24) and agreed (Rec. 24, Partial Agreed Statement, par. 6) that the same relief could be had herein against it as could have been had against the purchaser at the foreclosure sale. Thereupon, the Colorado Company filed its motion (Rec. 3-12) to construe and enforce the "Old Decree" in the Main Case by such process as might be appropriate. Answer (Rec. 13-20) and replication (Rec. 22-23) were duly filed. These were the pleadings upon which were made the issues between the parties. A large amount of testimony was taken (Rec. 23-592), at the close of which Judge Rogers at the first trial held (Decree, Rec. 597-599, Opinion, 144 Fed. Rep. 476) that the use to which the Colorado Company was entitled to put the property was as claimed by it, *equal* to that made by the Wabash Company, and not as claimed by the latter, *limited* to the mere passing of trains, but that such use was limited to a *part* only of the right of way, a mere strip from 28 to 30 feet wide, the effect of which was to exclude the Colorado Company from any practical use of the turnouts, turn-tables, and other terminal facilities expressly mentioned in the decree, because none of these were upon such a strip. His view, upon which was based

the decree appealed from, was that the agreement upon which the "old decree" was founded, only gave to the Colorado Company the right to use as a right of way a continuous strip of ground 42 feet wide through the park and 28 to 30 feet wide from the park to 18th Street, *all* of which was acquired by the tripartite agreement from the St. Louis County Railway Company, herein called the County Company, a predecessor in title. This view was wholly unwarranted in fact and in law, was a misconception originating with Judge Rogers, and not even based upon the contention of the Wabash Company, as was decided by all the judges upon appeal (81 C. C. A. 643, 152 Fed. Rep. 849; Rec. 601).

6. Origin of the Right Claimed.

In 1875, the St. Louis County Railway Company, herein called County Company chartered as a narrow gauge road, claimed a railroad right of way 70 feet in width through Forest Park, one of the public parks of St. Louis. It had, preparatory to building a line into that City, acquired a number of detached lots between the Park and the Union Depot, but far from enough to either make a continuous or sufficient right of way for a modern railroad in a large city. The St. Louis, Kansas City & Northern Railway Company, herein called the Kansas City Company, then had a line extending from Kansas City to the northern line of the Park, where it connected with the right of way of the County Company. These two companies then entered into a written contract (Rec. 235-240) in which the County Company agreed to convey to the Kansas City Company a strip 28 feet wide through each lot then owned by it, between the eastern line of the Park and the then

western limits of the city, and a strip 30 feet in width through each lot owned by it lying between the then western city limits and the Union Depot at 18th street, and an undivided half interest in its claimed right of way through the Park. The Kansas City Company was, at its own expense, to make a tunnel and cut for the joint use of the two, just east of the Park. The County Company was to complete its road and reimburse the Kansas City Company for one-half of the cost of such tunnel and cut, failing in which, as it did, it was to relinquish all claims to its use. Thereupon the County Company conveyed (Rec. 247-258) to the Kansas City Company said strips 28 feet and 30 feet wide respectively, off of the lots owned by it, and an undivided half interest in a right of way through the Park, and thereafter, by purchase and condemnation of other property, the Kansas City Company completed a right of way of varying and somewhat extensive width to the Union Depot. These two companies entered into an agreement (Rec. 241-247) with the commissioners of Forest Park, herein called the "tripartite agreement," by which, among other things, it was agreed that the right of way *claimed* through the Park should be reduced from 70 to 42 feet, and enjoyed upon the condition that the *County Company* should permit "other railroads to use *its* right of way through the Park and up to the terminus of its road in the City of St. Louis," but if it should, as it subsequently did (Rec. 86), cease to have, maintain and enjoy any right or privilege granted it, such right and privilege should, nevertheless, continue in the Kansas City Company, *but upon the same terms and conditions* i. e., that any other company could use the *right of way* of the *Kansas City Company* through the Park and up to the

Union Depot. The County Company not having a *continuous* right of way between the Park and 18th street, and never completing its road, the Kansas City Company acquired one (Stipulation Rec. 196-197), so that in the end it, or its successor, into which it was merged, the Wabash, St. Louis & Pacific Railway Company, had a *complete* strip of land for a railroad to the Union Depot, as shown by Chart A (Rec. 78, 591), the portions in blue indicating (Rec. 50, 51, 86) the *incomplete* part of a right of way owned by the County Company, and by it conveyed to the Wabash Company. So that it is plain that the right of way to the use of which the Colorado Company was entitled was not, as assumed by the trial court at the first trial limited to that acquired by the tripartite agreement or from the County Company, but was that of the Wabash Company, and there was, as will be hereinafter shown, no limitation either as to its width or as to how, when, or from whom, it had been acquired. So it was decided in the Main Case (*Joy* v. *St. Louis*, 138 U. S. 1, 34, 34 L. Ed. 843), and so the Circuit Court of Appeals unanimously held (Rec. 601, 81 C. C. A. 643, 152 Fed. Rep. 849). The sole controversy now is whether the Colorado Company was excluded from the use of such parts of the industrial tracks as were not located upon the particular strip of land.

(7.) Construction by the Parties of the "Old Decree" and the Contract Upon Which it was Based.

(a). The "Old Decree" made the words "right of way", all that were used in the contract, also include "tracks, sidetracks, switches, turnouts, and *other ter-*

minal facilities." This accorded with the views expressed by Mr. Justice, then Circuit Judge, Brewer (29 Fed. Rep. 546,) and Mr. Justice Blatchford (138 U. S. 1, 34 L. Ed. 843) and finds support in the subsequent opinions of Judges Sanborn (Rec. 601-620; 152 Fed. Rep. 849-863,) and Hook (Rec. 620-621; 152 Fed. Rep. 849, 863-864).

From its date, December 31, 1886, for more than sixteen years, no one questioned its meaning. When, however, the Colorado Company became part of the system of The Chicago, Rock Island & Pacific Railway Company, which was an active competitor for the business of the Wabash Company, a difference arose between the parties, and upon May 7, 1902, the Wabash Company, for the *first* time (Motion, par. 7, Rec. 9, Partial Agreed Statement par. 16, Rec. 28) attempted to limit its words so as to give to the Colorado Company only the use of the Wabash rails for the mere passing of trains. No one, however, before the first decision of Judge Rogers, ever attempted to limit the *width* of the right of way, the use of which was accorded by the "Old Decree," even the answer (Rec. 13-19) making no such claim.

(b) In the meantime, for over sixteen years, and up to the date of the first trial below, the Colorado Company, with a wheelage (Rec. 432, 433-439) of 12.29 per cent as against that of the Wabash Company of 87.71 per cent, under the terms of the decree, paid $30,000 per year cash rental (Rec. 26-27, Partial Agreed Statement, Par. 13), or nearly $500,000, representing a sum equaling one-half of six per cent annual interest upon the valuation of all railroad property, regardless of its width, char-

acter or use, between the Park and 18th street (Decree in Main Case, Rec. 293-294); its proportion of *all* the taxes upon *all* of said property (Rec. 25-26, Par. 11); its proportion of *all* the repairs and of *all* the maintenance of *all* such property, including the yards and other property (Rec. 26, Partial Agreed Statement, Par. 12; Evidence Pryor, Rec. 508, 509, 510, 511; Petition in Luke case, Rec. 440-475), and whenever anything was paid by the Wabash Company upon acount of any industrial track between 18th street and the Park, *no matter where located or with what part of the right of way it was connected*, the Colorado Company was charged with and paid, under the decree, its proportion of the amount paid on account thereof by the Wabash Company (2nd Agreed Statement, Rec. 347-360; Depositions Taylor, Rec. 320-326; Haynes, 328-333; Hines, 333-336; Decker, 336-338).

(8.) Question Here Presented.

The question between the parties is, whether the decree does, as it reads, give the Colorado Company the right to "*the equal use and benefit* of said *right of way*, tracks, switches, side tracks, turnouts, turntables and *other terminal facilities*", or whether such equal use is, by construction, to be limited to an unequal use, of the particular strip of land acquired as a right of way, by depriving appellant of the use of the terminal facilities *expressly* mentioned in the decree, which were in fact adjacent to and connected with the tracks and themselves partially located upon the strip of land, and only of use or value because of such connection, being short tracks leading from the main line and right of way proper to adjoining private industries, constructed by the Wabash

Company which furnished the material and located in part upon the land of the industries.

(9.) THE MOTION OR PETITION UPON WHICH WAS ENTERED THE DECREE APPEALED FROM.

The Colorado Company filed in the Main Case its motion or petition (Rec. 3-13) in which was set forth (a) the entry of the "old decree" (Rec. 4-7) of December 31, 1886 and its affirmance (Rec. 7) giving it the right to the equal use of the entire right of way of the then Wabash, St. Louis & Pacific Railway Company between the north line of Forest Park and 18th street in St. Louis, Missouri, and requiring it to pay therefor, a fixed rental of $2500.00 per month, or at the rate of six per cent annual interest upon one-half the valuation of the entire property and all terminal facilities between said points; and to pay in addition thereto its proportion upon a wheelage basis of the taxes and maintenance thereof; (b) the purchase of the property under mortgage foreclosure decree by the Wabash Western Railway Company, which was required to and did enter its appearance as a party to the still pending Main Case, which company afterwards by consolidation became the Wabash Railroad Company, the present owner; (c) the fact that up to May 7, 1902, the Colorado Company continuously used the entire property under and in accordance with the decree, when the Wabash Company for the first time claimed (Rec. 13) that the Colorado Company had no right under the decree "except to use the main tracks * * * for passing trains and passing tracks for the sole purpose of permitting trains to pass each other," and (d) insisting upon such claim, and in excluding the Colorado Company from any other use, the motion or petition was filed to construe and enforce the decree.

(10.) THE ANSWER AND REPLICATION.

The answer (Rec. 13-20) practically admitting all the averments of the motion except as to the meaning of the decree, set forth (Rec. 17) that

> " * * this defendant and its predecessors have always claimed and still claim, that petitioner has only the right of ingress and egress with its trains, engines, etc., to and from Eighteenth street over this defendant's right of way and no right to the use of said right of way or tracks or other facilities *thereon for any other purpose*, and no right to reach any of the industries along said right of way, or to load or unload cars, or to receive or deliver freight, on any of said side-tracks, or on said right of way between Union avenue and Eighteenth street aforesaid, under said decree."

The replication (Rec. 22-23) put the case at issue.

(11.) PROOFS IN THE CASE.

The proofs consisted of:

First. The first partial agreed statement of facts (Rec. 23-29). This, among other things, incorporated as exhibits, Chart A (Rec 591), showing (Rec. 35) the property, of varying width as it was when the decree in the Main Case was entered, and in blue color (Rec. 50, 51, 86) the portion thereof acquired from the County Company; and exhibit "D" (Rec 592) showing (Rec. 27) the tracks thereon, there having been no additional land acquired since the entry of the decree in the Main Case; also the record in the Main case, Exhibit "B" (Rec. 30-313), and the form of contract (Rec. 313-315) under which all industrial tracks were constructed, by the

was to be paid by the industry, and material furnished by the Wabash Company.

The facts so agreed in substance were: (a) The particular strip of land of the Wabash Company, between the north line of Forest Park and 18th street, at the time the Colorado Company filed its petition of intervention in the Main Case, was (par. 1) as shown on Chart A (Rec. 591). The extent of this strip has not been since changed, but some additional adjacent and connecting industrial tracks have been (par. 14) laid thereon and to and from same, as shown by Exhibit "D" (Rec. 592) under contracts in form shown by Exhibit "C" (Rec. 313-315) providing that the cost of construction and maintenance should be borne by the industry and materials furnished by the Wabash Company. (b) The Main Case was a foreclosure proceeding against the Wabash, St. Louis & Pacific Railway Company, in which were appointed receivers, the decree of foreclosure retaining jurisdiction of the cause. Under the foreclosure decree the title to the mortgaged property vested, subject to the right of the Colorado Company, in the Wabash Western Railway Company, which was required to and did enter its appearance as a party; all as shown by the extracts from the record afterwards offered (Rec. 315-316), the Wabash Western Company thereafter consolidating with other companies into the Wabash Railroad Company, which, for the purposes of the proceeding, was to be regarded as "subject to all such liability and procedure under said decree as was the Wabash Western Railway Company" (Par. 2-6). (c) The Colorado Company filed in the Main Case its intervening petition and the proceedings had therein were such as are set forth in Exhibit "B"

(Rec. 30-313) resulting in a decree giving it in words the right to use all of the property of the Wabash Company, including terminal facilities, between the north line of Forest Park and 18th street, which decree was affirmed, the report thereof (138 U. S. 1) being by reference made part of the record (Par. 8-10); (d) The Colorado Company, in accordance with the decree it thus obtained, at all times thereafter paid the taxes upon all such property, regardless of its width (par. 11) and likewise its proportion of the maintenance of the same (par. 12) except as to the industrial tracks, as to which, the matter was left open to proof. As to these, there were many upon which the Colorado Company made payment (2nd Partial Agreed Statement of Facts, Rec. 347-360; depositions B. F. Taylor, Rec. 320-326; A. S. Haynes, Rec. 328-333; Michael Hines, Rec. 333-336; Warren Decker, Rec. 336-338), though there was some unsatisfactory proof, (most of the Wabash records having been lost or burned) that there were instances when the Wabash Company did not collect from the Colorado Company for some industrial tracks (Depositions for Wabash Co., Rec. 475-582), a fact of little value and of no significance, since, under the contracts (Rec. 313-315) with the industries, the latter were required to, and in such cases did, pay for the construction and maintenance of all such tracks, so that they cost the Wabash Company nothing, and hence it would not have been proper to have made a collection on account thereof from the Colorado Company.

Second: A portion of appellant's argument (Rec. 29) in the supreme court and appellee's answer thereto (Rec. 29-30). In this argument, appellant therein con-

tended that the decree was broader that the contract upon which it was based, and broader than the prayer of the intervening petition, in that it gave to the Colorado Company the right to the use of all of the Wabash property between Forest Park and 18th street and its terminal facilities, and was not limited to such portion of the land as had been by the tripartite agreement acquired from the County Company.

Third: Provisions of the foreclosure decree in the Main Case retaining jurisdiction of the cause (Rec. 315) confirming title in the Wabash Western Railway Company upon condition (Rec. 316) that it took the property subject to all orders and decrees entered in the cause, and requiring it to enter its appearance as a party, which it (Rec. 316) subsequently did.

Fourth: Depositions of B. F. Taylor (Rec. 320-326), A. S. Haynes (Rec. 328-333), Michael Hines (Rec. 333-336), Warren Decker (Rec. 336-338), and exhibits thereto, showing that the Colorado Company *had been charged with and paid its proportion upon a wheelage basis of the maintenance of tracks extending to private industries,* just as it paid its proportion, under the decree, for the maintenance of the other property.

Fifth: The second partial agreed statement of facts (Rec. 347-360) showing repeated instances in which the Colorado Company was so charged for a proportion of the maintenance of industrial tracks, from which it appears that either the Wabash Company departed from the terms of the usual contracts (Rec. 313-315) and made some payments on account of industrial tracks or collected from the Colorado Company on account

thereof, when the private industry and not the Wabash Company had actually borne the expense. The presumption is that when it collected from the Colorado Company for construction, it, and not the industry, had paid the cost.

Sixth: Depositions of S. T. Emerson (Rec. 425-427) and William Mitchell (Rec. 427-432) showing that the Colorado Company always paid, as was admitted (Rec. 508-509) by E. B. Pryor, a chief officer of the Wabash Company, and was always required to pay under the decree, for the maintenance of all the property, including the terminals, between the north line of the Park and 18th street, without any limitation as to its width or the character of the use made thereof.

Seventh: Exhibit A (Rec. 433-439) proven to be correct by the undisputed evidence of R. W. Andrews (Rec. 431-432) showing the wheelage of the two roads from 1887 to 1902, and that the entire use, the Colorado Company only had an average of 12.29 per cent as against 87.71 per cent by the Wabash, although for all these years the Colorado Company paid a fixed rental of $30,000 per year upon the basis of being entitled to one-half of the use of the entire property.

Eighth: Intervening petitions (Rec. 440-475) filed by the Wabash Company in the pending foreclosure receivership of the Colorado Company. These interventions presented bills for rentals, taxes and maintenance which had accumulated under the decree in the Main Case, and alleged that all the cost of all the maintenance was charged under the decree (Rec. 444-447, 463); that the rental and maintenance charges were for all the property, including the *shops* which

were not claimed to be on any 28 or 30 foot strip without a suggestion of limitation in width or otherwise (Rec. 442, 444, 445, 446, 461, 463, 471, 472) and that under the decree the Colorado Company was entitled (id.) to the use of all such property.

Ninth: Depositions in behalf of the Wabash Company (Rec. 475-589) consisting of those of William F. Tufts (Rec. 476-486), B. F. Taylor (Rec. 486-507), E. B. Pryor (Rec. 507-513), Henry L. Magee (Rec. 513-525), William M. Tait (Rec. 525-536), and Fred W. Woerheide (Rec. 536), together with exhibits thereto (Rec. 542-589). From these depositions it appeared that upon some industrial tracks some work was done, no part of which was charged to the Colorado Company. This proof is of little value because most of the records, of the Wabash Company are missing or have been burned, and because under the contracts (Rec. 313-315) for these tracks the owners of the industries were to make the payment. If they did so there was no right to call upon the Colorado Company for any part thereof.

(12.) Proofs in the Case Continued. Record in Main Case.

1st. Exhibit "B" (Rec. 30-313) to said partial agreed statement of facts, contains the record in the intervention in the Main Case, consisting of; Intervening petition (Rec. 31-38); exhibits thereto (Rec. 38-44); orders of reference (Rec. 45-46); evidence upon the first hearing before the Master (Rec. 47-123); first report of Master (Rec. 123-151); Judge Brewer's first opinion (Rec. 151-153); order of re-reference (Rec. 153-154); amended intervening petition (Rec. 154-161); answer thereto (Rec.

161-177); replication thereto (Rec. 177); testimony upon re-reference (Rec. 178-203); master's second report (Rec. 203-225); exceptions thereto (Rec. 225-234); agreement of St. Louis, Kansas City & Northern Railroad Company (Rec. 235-240); tripartite agreement (Rec. 241-247); exhibits thereto (Rec. 247-288); petition of purchasing committee to become parties (Rec. 288-291); order allowing same (Rec. 291-292); final decree (Rec. 292-296); opinions of court (Rec. 296-313.)

2nd. From this record this appears: The Colorado Company was on, and has been since July 12, 1886, a railway corporation organized and existing under the laws of Kansas, owning and operating a line of railway extending from the west to a point where the same intersects with the north line of Forest Park in St. Louis (Rec. 24-25, Par. 7). On July 12, 1886, it was desirous of entering St. Louis and using for that purpose the road and property of the Wabash Company from the north line of Forest Park to 18th street, or Tayon avenue, which was the west line of the Union Depot. Accordingly there was on that date filed (Rec. 25) in the "Main Case," a petition of intervention (Rec. 31-38; 138 U. S. 1, 2) by the Colorado Company and the City of St. Louis to enforce such right, based on the contention that the Wabash Company *obtained its right to run through Forest Park* (established and placed under control of commissioners by state law; Laws of Mo. 1874, p. 371) upon an agreement (Rec. 241-247) to permit any other railroad company, upon fair and equitable compensation, to use *its right of way* from the north line of Forest Park through the park and to its terminus at 18th street in St. Louis, of which right intervenor desired to avail itself. The intervention was first referred (Rec. 45) to

Edmund T. Allen as Special Master, for whom George H. Shields was (Rec. 45-46) subsequently substituted. No answer was filed, but much testimony was taken by both parties upon the first hearing (Rec. 47-123) before the Master, who reported (Rec. 123-151) that, (a) the Wabash Company was bound to grant to the Colorado Company the right demanded; (b) the value of the property to be used was fixed at $1,000,000, and the total value of its use was 6 per cent per annum, of which the Colorado Company should pay its proportion upon a wheelage basis, and upon a like basis pay for all repairs, maintenance and the expense of operation of the tracks; (c) the trains should be operated under the rules of the Wabash Company, subject to the supervising control of the court; (d) the right thus found should be enforced by the mandatory injunction. Mr. Justice, then Circuit Judge, Brewer upon this report delivered (Rec. 151-153) an opinion saying that the Colorado Company had not yet built to Forest Park, and upon this opinion an order (Rec. 153-154) of further reference was made, with a direction to the receivers, the Wabash Company and the mortgage trustees to file answers to the intervening petition. Thereupon intervenor filed (Rec. 154-161) an amended intervening petition. This was answered (Rec. 161-177), the Wabash Company among other things claiming that the tripartite agreement only gave the right to use the part of the right of way owned by the County Company, and that the Wabash Company had by purchase and condemnation acquired a completed right of way, *the additional part of which was not subject to the agreement.* A replication was filed (Rec. 177). Additional testimony was taken (Rec. 178-203) and the Master made an additional report (Rec. 203-

225) confirming that which he had theretofore reported. The Master's first report (Rec. 140-145) set out that the testimony on the first hearing showed that the Colorado Company, seeking to pay as little as possible, asked that the compensation be fixed upon a valuation of the right of way and tracks, whereas the Wabash Company, seeking to obtain as much compensation as possible, claimed that the *entire* road and *terminal facilities between* the Park and 18th street should be included. After reviewing the testimony offered by intervenor, he found the valuation contended for by it too low, and fixed a larger valuation, because (Rec. 142-143) as the Wabash officials contended, that the valuation should be fixed upon the basis of the value of "the real estate tracks, *the side tracks laid thereon and other appurtenances for doing business,* * * * * * * * * * * * * that the reason the *whole* property should be taken in the value is that you cannot do business without the sidings, switches, etc., *for the purpose of storing, loading and unloading cars.*" It is therefore certain that the Master fixed the valuation by including every right and *facility* between said points belonging to the Wabash Company. Upon a further reference, additional testimony (Rec. 178-203) was taken as to the value of the property, and the Master reiterated his finding (Rec. 224) that the value must, in accordance with the *then* contention of the Wabash Company, "include the superstructure or *terminal* facilities occupied by the Wabash, which the testimony of Mr. Talmage (its General Manager) shows would necessarily be used if the intervenor had the right to use the Wabash tracks." Exceptions to the report were filed by the Wabash Company (Nos. XI and XII, Rec. 225-234) in which the Wabash representa-

tives made no point as to compensation except that the valuation was not high enough and that the value of the use should be divided equally between the two companies. The first subdivision of Exception XI (Rec. 232) asserted that the property was to be valued "for railroad purposes," and by the fourth subdivision (Rec. 233) the claim was made that the *measure* of compensation *"as fixed by the Wabash officials was"* proper, equitable and just, while the third subdivision of Exception XII (Rec. 233) asserted that the testimony of defendant's experts should not be considered, because the same was limited "to the value of said right of way *for other than railroad purposes.*"

Upon these exceptions, Mr. Justice, then Circuit Judge, Brewer delivered an opinion (29 Fed. Rep. 546, 559, Rec. 296-311) in which he sustained the Master's report, with the exception that he charged intervenor with one-half of the value of the use, instead of its proportion in accordance with its wheelage, *because intervenor obtained the equal right with the Wabash Company of the entire right of way, including access to the various industries along the line, and became an equal competitor on equal terms for their business.* He therefore entered a decree (Rec. 4-7; 292-296) giving intervenor, upon the compensation fixed, "the equal use and benefit of said right of way, tracks, switches, *side tracks*, turnouts, turntables and *other terminal facilities*" of said Wabash Company between said points. From the decree the Wabash representatives appealed (Rec. 25), and here contended (138 U. S., 1, 25, 29, Rec. 29) that the court below erred "in making a decree broader than the contract, in that the *County* company only agreed, at most, to permit other companies to use *its* right of

way, while the decree gives the right to use the right of way and tracks, side-tracks, switches, turnouts, turntables and *other terminal facilities of the Wabash Company.*"

The Supreme Court affirmed the decree (id. 51) not only denying (138 U. S., 1, 44-46) the contention, but also (id., 47-48) holding that the prayer was for all that was necessary to secure a *practical* specific performance, and that the Circuit Court having adopted the rate of compensation insisted upon by appellants, and the Colorado Company not having taken an appeal, the question of the rate of compensation was concluded between the parties.

(13) Opinion of the Court Below.

(a) The opinion of Judge Rogers upon the first trial (144 Fed. 476) seems to have been based upon the idea that the contract upon which the "Old Decree" was founded only gave the right to the Colorado Company to use the portion of the right of way which had been acquired by the terms of the tripartite agreement from the County Company, assumed to be 28 to 30 feet wide and continuous from the Park to 18th street.

The opinion was based upon the erroneous assumption that the *entire* right of way covered by the "Old Decree" was obtained by the tripartite agreement, whereas, the only part thereof obtained by virtue thereof, was a 42 foot right in the Park, and a strip 28 to 30 feet wide off of some detached lots owned by the County Company between the Park and 18th Street. Such were the stipu-85,-86, 196-197 302-303) the averment of answer (Rec. 175) therein, the report of the Master (Rec. 137) and the opinions of Mr. Justice Brewer (Rec. 306), and Mr. Justice Blatchford 138 U. S. 1, 7, 11.

Judge Sanborn (152 Fed. Rep. 849, 852, 854; Rec. 606-608) with the concurrence of all the judges, put this beyond question, expressly deciding that there was no limitation in the width of the right of way, and that it made no difference how, when, or from whom it was acquired, for the covenant enforced by the "Old Decree" charged the *entire* right of way of the Wabash Company between the points designated.

(b) When, however, Judge Sanborn reached the close of his opinion, he held (152 Fed. Rep. 849, 863; Rec. 619) that the "Old Decree" did not reach or cover any part of any industrial track or terminal facility not on the particular and specified strip of land known as the right of way of the Wabash Company. From this conclusion, Judge Hook dissented (152 Fed. Rep. 849, 863, 864; Rec. 620, 621). As this difference between the two judges is the question to be here decided, we leave until the argument the quotations from their respective opinions.

(14) Proceedings in the Circuit Court after Reversal By the Circuit Court of Appeals Including The Entry Of The Decree From Which This Appeal Is Prosecuted.

When the mandate (Rec. 593-595) reached the Circuit Court, appellant, as already shown, by leave of court and "by *consent* of parties" (Rec. 597), filed an amendment to its petition setting up the action aforesaid, the mandate of the Circuit Court of Appeals and averring that neither the Circuit Court of Appeals nor the Circuit Court had any right to exclude it from the use of the parts of the industrial tracks of the Wabash Company beyond the limits of the land owned by it, and

to enter a decree so doing would fail to give full faith and credit to that entered by Mr. Justice Brewer and the mandate of affirmance from this court, all contrary to sections 1 and 2 of article III and article IV of the Constitution of the United States, it having been said in Embry v. Palmer, 107 U. S. 9, 27 L. Ed. 346, 349, that these sections required to be accorded to a decree of a federal court, the same full faith which must be given under section 1, article IV, to one of the state courts.

The circuit court, by Judge Rogers, then entered a new decree (Rec. 625, 626) giving appellant the use of all the property upon the particular strip of land, commonly called the right of way of the Wabash Company, between Forest Park and 18th street, but excluding it from the use of its industrial tracks between said points, not actually upon such strip, holding that if the industrial tracks were between such points and owned and used by the Wabash Company, yet not located upon that particular strip, they were not then within the benefit of the decree, even though adjacent to, connected therewith, and part of the terminals located thereon. The decree (Rec. 625) so entered (the italicized words being the subject of the present complaint) reads:

> "The decree of December 31st, 1886 set out in the intervenor's application and motion, is in full force and effect, and is binding upon the St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, and upon the defendant Wabash Railroad Company, its successors and assigns. The said Wabash Railroad Company, its officers, agents and employes, are hereby enjoined to forthwith accord to the St. Louis, Kansas City & Colorado Railroad Company, its successors and

assigns, upon the terms fixed in said decree, the enjoyment of the joint and equal use of the entire strip of land between the east line of Forest Park and Eighteenth Street in St. Louis, Missouri, which the predecessor of the Wabash Railroad Company owned or had acquired the right to use when the said decree of December 31, 1886, was rendered, and of the tracks, side-tracks, turn-outs, turntables and terminal facilities now thereon, *but is not entitled to the use, under that decree, of any of the property, industrial, or railway facilities of the Wabash Railroad Company, beyond the limits of that strip* and said Wabash Railroad Company, its officers, agents and employes are enjoined from refusing to permit such use under the terms of said decree by said St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns."

It is from this decree this appeal (Rec. 626) is prosecuted.

Specifications of Errors Relied Upon.

The errors assigned (Rec. 627), upon which appellants rely, specify that the court below erred in each of the following respects:

1. In rendering the decree of December 20th, 1907, for that the same was contrary to the law and contrary to the evidence in the case.

2. In rendering and entering that portion of said decree providing, "But it is not entitled to the use, under that decree of any of the property, industrial or railway facilities of the Wabash Railroad Company, beyond the limits of that strip."

3. In rendering and entering the said decree and particularly each portion thereof herein complained of, the Court failed to give full faith and credit to the decree of December 31st, 1886, and its affirmance to which appellant was entitled, under and by virtue of the following provisions of the constitution of the United States:—Section 8, Article I; Sections 1 and 2 of Article III; Section 1 of Article V and Article VI.

ARGUMENT.

I.

THE LANGUAGE OF THE OLD DECREE, AND THE DIFFERENCE IN OPINIONS BELOW IN REFERENCE THERETO.

So far as general language could give it, the "old decree" (Rec. 4, 5) covers all the property of the Wabash Company between certain points by thus describing it:

> "The right of way and tracks, side-tracks, switches, turn-outs, turntables and *other terminal facilities* of said Wabash, St. Louis & Pacific Company at and between the north line of Forest Park and Eighteenth street in the city of St. Louis."

The opinion of Judge Sanborn in the Circuit Court of Appeals (Rec. 606, 152 Fed. Rep., 849, 852) exhaustively discussed this question in dealing with that part of the decree of the Circuit Court (144 Fed. Rep. 476) which limited the intervenor's use to a 30-foot strip of the right of way. He, among other things, said:

> "To one ignorant of the origin and history of the rights of the contending parties and unaware of the persuasive arguments of counsel, the reading of this decree would suggest no doubt that it granted the joint use of the entire strip owned by the Wabash Company and of all the railroad facilities thereon between the east line of the park and Eighteenth street. Upon its face there is no ambiguity in its terms. They suggest no limitation or exception, and, when the terms of a decree are plain and clear, their ordinary meaning and effect may not be law-

fully contracted or extended, unless it appears with reasonable certainty that such was the purpose of the court; for the legal presumption is that the judge carefully and thoughtfully expressed therein his deliberate intention. The Wabash Company, therefore, assumed no light burden when it essayed to prove that the court intended by this decree to grant to the Colorado Company the joint use of a strip only 30 feet in width out of the wider strip the Wabash Company owned between the east line of the park and Eighteenth street."

When, however, Judge Sanborn reached the close of his opinion (152 Fed. Rep., 863, Rec. 619) in excluding intervenor from the use of the industrial tracks, he simply said:

> "The conclusion is that the Colorado Company is entitled to enjoy the joint and equal use of the entire strip of land between the east line of the park and Eighteenth street which the Wabash owned or had acquired the right to use when the decree of 1886 was rendered, and of the tracks, side-tracks, turn-outs, turntables, and terminal facilities now thereon. But it is not entitled to the use under that decree of any of the property, industrial, or railway facilities of the Wabash Company beyond the limits of that strip. *Union Pacific R. Co.* v. *Mason City & Ft. Dodge R. Co.*, 199 U. S., 171, 26 Sup. Ct., 19, 50 L. Ed., 134."

No reason was given for this restriction other than that the learned judge regarded as controlling the decision of this court in *U. P. R. Co.*, v. *Mason City & Ft. Dodge R. Co.*, 199 U. S., 160, 50 L. Ed., 134. Judge Rogers, in the decree (Rec. 625) from which this appeal is prosecuted, excluded appellant from the use "of any of the property, industrial or railway facilities, of the

Wabash Railroad Company beyond the limits of that strip" thus allowing the use of the industrial tracks until they reached an imaginary line which was the boundary of the strip. When that *imaginary* line was reached the right to the use ceased. As the industry was beyond that line the result was exclusion from the industry.

Judge Hook, in dissenting from this view (152 Fed. Rep., 863, 864, Rec. 620, 621) not only pointedly showed the error thereof, but also that the case relied upon had no bearing whatsoever upon the question. His language was:

> "I concur in the reversal of the decree of the trial court, and also for the most part in what is said in the foregoing opinion. I do not, however, concur in the exclusion of the industrial tracks from the operation of the decree of 1886. These tracks are the usual and necessary features of railway terminals in a large city, and are as much a part thereof as the limbs are of a tree. They go with the right of way as appendages thereto, and are always so regarded. Their use is essential to the enjoyment of the rights awarded. In my opinion they are clearly within the spirit of the decree of 1886, and also by fair construction within its letter. The decree granted to the intervenor the 'right of way, tracks, switches, side-tracks, turn-outs, turntables, and other terminal facilities of the Wabash Railway Company between the north line of Forest Park and Eighteenth Street in the city of St. Louis.' This is very broad language and it was repeatedly employed in the decree. That Judge Brewer intended to include such industrial tracks as were in existence when the decree was made also seems plain from his opinion (29 Fed., 559). The cost of their construction was included in the total cost upon

which the percentage compensation to be paid by the intervenor was based. Moreover, the consistent course of conduct of the parties for 13 years following the decree shows that they regarded them as being a part of the property the joint use of which was granted to the intervenor. I am unable to see any persuasive reason for excepting them from the comprehensive enumeration of terminal facilities in the decree. That they extend beyond the side lines of the strip of land owned by the Wabash Company and upon the land of others seems to me to be a circumstance wholly immaterial, and yet it must be the circumstance upon which their exclusion from the decree is made to depend. The Wabash Company owns these industrial tracks and operates them as part of its right of way and terminal facilities. Of what importance is it that they are in part upon public highways and the land of others under license instead of being wholly upon land owned by that company? If the latter condition existed, it would doubtless be conceded that they fell within the decree. The scope of the decree is, therefore, determined not by the character of the tracks and their relation to the right of way and terminal facilities as a whole with which the court was dealing but by the character of the title of the Wabash Company to the ground upon which the tracks are laid. It seems to me there has been a narrowing of the decree in this particular.

The case of the *Union Pacific Company* v. *Mason City Company*, 199 U. S., 160, 171, 26 Sup. Ct., 19, 50 L. Ed., 134, is not an authority for this construction of the decree. The court was there considering a claim of the Mason City Company for the use of the Union Pacific bridge across the Missouri River at Omaha, and its approaches. Naturally this would not include industrial tracks and switches. Indeed, when rightly regarded, the decision of the Supreme Court makes for a conclusion

contrary to that reached by my associates. An act of Congress conferring in the most general terms upon other railroad companies the right to cross the bridge at Omaha was held to give the Mason City Company the right not only to cross the bridge, but to use several miles of main and passing tracks of the Union Pacific in the cities of Omaha and South Omaha. The decision well serves to illustrate the liberality with which provisions of the kind we are now discussing are construed when public interests are involved. Of course, the right to use industrial tracks laid since the decree of 1886 was rendered would require consideration of the subject of compensation. The compensation specified in the decree does not include them.

There are also some other observations near the close of the foregoing opinion which I think are not necessary to the consideration of the case. They relate to conditions which it is conceded do not exist at present and which may never arise in the future. I do not wish to express or concur in any view concerning them until they arise and are presented for judgment in the usual way."

The "Old Decree" gave the use of *all* "terminal facilities" between given points. The industrial tracks were *partly* on the strip called the right of way, and *continued* therefrom to adjoining and adjacent industries, giving them their *only* railroad connection. To and upon these tracks the switch engines of the Wabash Company were at all times running. No one could know when the track crossed the particular strip and reached the land of the industry. This was a "terminal facility," as plainly as words can describe it. Since the "Old Decree" gave the use of *all* "terminal facilities," it necessarily gave the use of such industrial

tracks, for as Judge Sanborn said (152 Fed. Rep. 849, 852; Rec. 606) thereof:

> "Upon its face there is no ambiguity in its terms. They suggest no limitation or exception, and, when the terms of a decree are plain and clear, their ordinary meaning and effect may not be lawfully contracted or extended, unless it appears with reasonable certainty that such was the purpose of the court; for the legal presumption is that the judge carefully and thoughtfully expressed therein his deliberate intention."

If these words did not aptly describe the situation, all doubts would be dissipated by a close study of the terms of the original contract, the facts leading up to the entry of the "Old Decree" and the record upon which it was based. To this phase of the case we now turn.

II.

UNDER THE CONTRACT UPON WHICH THE "OLD DECREE" WAS ENTERED, THE COLORADO COMPANY WAS ENTITLED TO THE EQUAL USE OF THE TERMINAL FACILITIES OF THE WABASH COMPANY.

(1). Origin of the Right.

We have already in our statement outlined the origin of the right upon which was based the "Old Decree". The County Company owned certain separate and detached lots between the Park and 18th street, strips from which were acquired by the Kansas City Company. These, as expressly stipulated (Rec. 50, 51, 86) were shown in blue on Chart A (Rec. 591). After the execution of the tripartite agreement "the Kansas City Company acquired from divers parties the necessary

additional right of way between the Park and the Union Depot," (138 U. S. 1, 11, 34 L. Ed. 843, 152 Fed. Rep. 849, 853, Rec. 607), all of which was shown (Rec. 50, 51, 85, 86, 196, 197) by Chart A (Rec. 594). This chart not only showed in blue the portion of the property thus acquired from the County Company, but also the entire right of way of the Wabash Company between Forest Park and 18th street, and it was this entire property, the acquisition of the use of which was the subject of the litigation in the Main Case and covered by the decree entered therein. All this clearly appears from the report of the Master (Rec. 136-137), the opinions of Mr. Justice, then Judge Brewer (Rec. 306-307), Mr. Justice Blatchford, (138 U. S. 1, 38-41), and Judge Sanborn (152 Fed. Rep. 849, 852-854; Rec. 606-608).

A few further suggestions will make this plain.

(2) The 9th Paragraph of the Tripartite Agreement.

The tripartite agreement (Rec. 241-246) was between the Park Commissioners as the first, the County Company as the second, and the Kansas City Company as the third party, and contained this (Rec. 243) clause:

> "Said party of the second part (the County Company) shall permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park and up to the terminus of its road in the city of St. Louis, upon such terms and for such fair and equitable compensation, to be paid to it therefor, as may be agreed upon by such companies."

Judge Rogers upon the first trial (144 Fed. Rep. 476), seized upon the idea that this paragraph alone

gave the Colorado Company the right to the use of the right of way, and conceiving that the County Company had a completed narrow right of way to 18th street, which was, by virtue of the tripartite agreement, vested in the Wabash Company, decided that the decree must be limited thereto because such was the subject of the contract. The majority of the Circuit Court of Appeals (152 Fed. Rep. 849; Rec. 619), rejected this view, but narrowly limited the use to that which was located upon the particular strip of land, the use of which had, at the time of the entry of the "Old Decree," been acquired by the Wabash Company.

(3) THE 12TH PARAGRAPH OF THE TRIPARTITE AGREEMENT.

The Wabash Company in the Main Case (Answer, Rec. 171) contended that paragraph 9 alone referred to the right of way of the County Company and did not affect or bind the Wabash Company particularly as to so much of the right of way as was not by that agreement acquired from the County Company (Master's Report, Rec. 172-173) and as the County Company never completed a right of way to 18th Street, paragraph 9 of the tripartite agreement was ineffective, and in no event of effect as against the property acquired from some other than the County Company. Had paragraph 9 stood alone, this contention would have been hard to answer, but the 12th paragraph (Rec. 244,) provided:

> "And whereas, for the purpose of enabling the party of the third part to reach the Union Depot, of St. Louis, Missouri, an amicable arrangement and agreement for a right-of-way outside of and through said Forest Park has been made and en-

tered into and between the parties of the second and third parts, and in pursuance thereof the parties of the second and third parts are to enter upon and enjoy the right of way and all the rights, privileges, immunities, powers, improvements and property belonging to, or vested in, or that may belong to, or vest in the party of the second part, in common, in, upon, and through said park under certain regulations, terms and conditions agreed upon by and between said parties therein. And, whereas, the party of the third part in further pursuance of said last named agreement, is about to construct, maintain and operate a railroad, in, upon, and through said park, at great expense, and to engage in other great outlays and to assume other heavy burthens and responsibilities to be of advantage to said party, through the continued enjoyment of said right of way and other rights, privileges, powers, franchises, immunities, improvements and property in, upon and through said park. Now, therefore, in view of the premises, and as inducements to said party of the *third* part to proceed as intended, the party of the first part does hereby grant and convey unto, and license and permit the said party of the third part, its successors and assigns, to have, hold, use and enjoy said right of way, in, upon and through said park in common with, and to be held and enjoyed, jointly, with said party of the second part, and its assigns on the terms of the said contract between them and under the same terms and conditions as are hereby and hereinbefore imposed upon said party of the second part, and which are hereby assumed by said party of the third part, as to improvements except as to building a depot and switch in said park, which the party of the second part is to do itself, or in case said party of the second part, its successors or assigns, should forfeit its said rights, privileges and franchises, in, upon and through said park, or from any cause cease to have, maintain

> or enjoy the same, then it is hereby agreed and covenanted that the party of the third part shall not also be excluded from said park, but shall with its successors and assigns, continue to have, maintain and enjoy all of said rights, privileges, immunities, franchises, improvements and property on the terms hereinbefore set forth, continuously and forever."

(4) The 12th Paragraph Bound the Right of Way of the Wabash Company.

The County Company never had a completed right of way to 18th street and never was built thereto, but ceased to have, maintain or enjoy any right through the park so that the Kansas City Company by paragraph 12 became bound to grant to any other company the use of *its* own right of way between the points in question, otherwise there never could have been obtained by the Colorado Company the right to reach the Union Station, because at varions points between the park and 18th street, there were spaces where no right of way ever was owned by the County Company. That the 12th paragraph bound the right of way of the Wabash Company regardless of how, when, or from whom, it was obtained, was distinctly reported by the Master (Rec. 137-138), decided by Mr. Justice, then Judge, Brewer (Rec. 306-307) and distinctly passed upon by the supreme court (*Joy* v. *St. Louis*, 138 U. S. 1, 34 L. Ed. 843, 853). The Master (Rec. 137-138) upon this subject said:

> "Although the right of way conveyed by the St. Louis County Railroad through the park and to Eighteenth Street was not continuous, but in separate parcels, it was contemplated by all of the

parties that the intervening ground would be obtained by the railroads and constitute a continuous right of way for railroad purposes, and all of the covenants of the contracts and deed were made with that understanding and really to effectuate that purpose, and the contracts and deed are so interlaced with each other as to require the consideration of all of them in the construction of any. Such being the case, the Master is of the opinion that the right of way from the north line of the park into the Union Depot must be considered as the subject matter under consideration by the parties and ought to be treated as one whole."

Mr. Justice Brewer (Rec. 306-307) said:

"It is argued with great force, however, by counsel for the respondents, that even if the purchasers were charged with notice of these terms and conditions, as attaching to the lands described in the deed, *inasmuch as the Kansas Road obtained a large portion of its right of way between Forest Park and the Union Depot from other sources, it took these latter portions free from any burden cast upon the lands specifically conveyed by the County Road.* 'Can it be,' he says 'that a condition in a deed, of a few feet of the right-of-way, in a long line of three hundred miles, casts a burden on the entire line, to be assumed by every succeeding purchaser?' I might answer this extreme case by a reverse question: Can it be possible, that a condition attached to substantially the entire right-of-way of this long line of road, can be defeated by the fact that some few feet have been acquired by a deed free from such condition? But these extreme cases do not constitute the practical matter before us. Here the County Road had an incomplete right-of-way through the park and to the Union Depot. A share of this incomplete

right-of-way it conveyed to the Kansas Road, subject to certain conditions. Can it be that the completion by the Kansas Road of this right-of-way, by purchase of intervening and isolated tracts, destroys the entire value of the conditions? Looking at this matter in a practical way and from a reasonable standpoint, I think the answer to this question must be in the negative."

Mr. Justice Blatchford (138 U. S. 1, 33, 38 L. Ed. 843, 853) said:

"It appears from paragraph 12, that the Kansas City Company had in view the failure of the County Companyto comply with the provisions of paragraphs 1 to 8 inclusive of the tripartite agreement, relating to the construction of the road, among which was the provision which required the completion of the road within one year, under the penalty of the forfeiture of all rights under the agreement. The Kansas City Company guarded against such contingency by the provision, in paragraph 12, that, in case the County Company, its successors or assigns, should forfeit its rights, privileges and franchises in, upon and through the park, or from any cause should cease to have, maintain or enjoy the same, then the Kansas City Company should not also be excluded from the park, but, with its successors and assigns, should continue to have, maintain and enjoy all of said rights, privileges, immunities, franchises, improvements, and property, on the terms thereinbefore set forth, continuously and forever. Thereby in case of the forfeiture of its rights by the County Company, the Kansas City Company became possessed of the entire right of way, subject to the terms of the agreement of August 11, 1875, between the two companies, and to those of the tripartite agreement of the same date; and that which, prior to the forfeiture, was held and enjoyed jointly by

the two companies, became the sole property of the Kansas City Company, its successors and assigns, on the terms of the said contract between the two companies, and under the same terms and conditions which were imposed upon the Kansas City Company. Among the conditions so imposed were those of paragraph 9 of the tripartite agreement."

These views were emphasized and enforced by Judge Sanborn (152 Fed. Rep. 849, 852-854; Rec. 606-608).

(5) THE COVENANTS IN PARAGRAPHS 9 AND 12 WERE FOR THE BENEFIT OF THE PUBLIC, AND ARE TO BE LIBERALLY CONSTRUED.

Having thus seen that there was the right to use the right of way of the Wabash Company, no matter from whom, when, or how, or by what title, acquired, it remains to be seen whether such use should, as decided below be limited to such facilities as the Wabash Company actually had located upon a specified strip of land actually *owned* or the use of which had been acquired by it, or whether a fair construction would include facilities immediately connected and used therewith, like short industrial tracks having no other railroad connection and *parts* of which were actually upon the strip. In determining this question it should be borne in mind that the right of way of the Kansas City Company, regardless of how or from whom acquired, or by what technical legal title, was, by virtue of paragraph 12, charged with the burden of permitting other companies to use it. It follows that the Colorado Company was no interloper, but availed itself of a provision in the tripartite agreement made *for the benefit of the public*, which therefore requires a liberal construction. Mr. Justice Blatchford repeatedly emphasized

(*Joy* v. *St. Louis*, 138 U. S. 1, 38, 40, 43, 47, 50, 51, 34 L. Ed. 843) this view:

> "The covenant in paragraph 9 of the tripartite agreement created an easement in the property of the County Company and the Kansas City Company for the benefit of the public, which might be availed of, with the consent of the public authorities, properly expressed, by other railroad companies which might wish to use not only the right of way through the park but also that between the park and the Union Depot. * * * Contracts of such a character are to be construed liberally in favor of the public when the subject matter concerns the interests of the public. * * * It would be inequitable to permit the Kansas City Company, or its successors, to continue to use the right-of-way through the park and at the same time to deprive the Park Commissioners, or their successors, the city of St. Louis, as trustees of the public, of the benefit of the use by other railroad companies of the right of way between the park and the Union Depot. * * * In case the County Company should forfeit its rights in the park, the Kansas City Company was to continue to enjoy the right-of-way on the terms imposed on the County Company by paragraph 9 of the tripartite agreement. Such construction of the contract is the only one consistent with fair dealing and the manifest intention of the parties. The tripartite agreement is the only muniment of title under which the appellants now enjoy the right of way. The grant of the right to other railroads to use such right of way through the park and to the Union Depot was a grant to the Park Commissioners, as trustees for the public, and is to be construed liberally. Paragraph 9 is imperative. It provides that the County Company 'shall permit' other railroads to use its right-of-

way. * * * *Considerations of the interests of the public are held to be controlling upon a court of equity, when a public means of transportation, such as a railroad, comes into the possession and under the dominion of the Court.* * * * *The rights of the public in respect to these great highways of communication should be fostered by the courts*; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the *development of the interests of the public* in the progress of trade and traffic, by new methods of intercourse and transportation. The present case is a striking illustration. * * * The city of St. Louis is, in the present case, not merely a nominal party, but is charged with the duty of protecting the park, and of preserving and *fostering the commerce of the city.* Both of these objects are clearly set forth in the tripartite agreement executed by the Park Commissioners, of whom the city of St. Louis is the successor, and the considerations thus arising are legitimate ones in a court of equity, the case being founded upon the tripartite agreement. * * * Under the tripartite agreement, the right-of-way through the park was obtained by the Kansas City Company, and in consideration of the covenants contained in paragraph 9 and other paragraphs of that agreement, $40,000 were expended by the Park Commissioners in aid of the construction of the railroad through the park, upon the right of way granted. Things were to be done by each party, for valuable consideration to be paid by one to the other. The Park Commissioners complied in all respects with the agreement. Although the one easement was granted in consideration of the other, the appellants refused to permit the enjoyment of the easement which they granted. The want of mutuality is urged when the appellants

are called upon to comply with the covenant *which is valuable to the city of St. Louis and the public whom that city represents.*"

An interested public looking to competition and direct connection with distant cities would find little comfort in such a conflict if a new company using the main tracks of a railroad (under a contract made by it for both), was denied connection with the industries and industrial tracks adjacent to and connected with, and already part of the old line.

(6.) THE RIGHT OF WAY INCLUDED ALL TERMINAL FACILITIES.

The convenant was for the use of the right of way, and this included all terminal facilities, no matter how much land the Wabash owned. The original contract (Rec. 243, 244, par. 9, 12) enforced by the decree (Rec. 4-7; 292-296) gave the Colorado Company the right to the use of the *right of way* of the Wabash Company, no matter how, by what title, or when acquired. The term "right of way" means more than the mere right of passage; more than the mere space for the main tracks; more than the strip of land actually owned. It includes the right to all terminal facilities. Mr. Justice Brewer (Rec. 305, 306) was of that opinion, as was Mr. Justice Blatchford (138 U. S. 1, 44-46, 34 L. Ed. 843). The construction of the words "right of way" was before the court in *Territory of New Mexico* v. *United States Trust Company*, 172 U. S. 171, 43 L. Ed. 407, where it was decided that the term not only included the main tracks, but all the necessary station buildings, work shops, depots, machine shops, switches, sidetracks, turntables and water stations, the opinion in *Joy* v. *St. Louis*, 138 U. S. 1, 34

L. Ed. 843, being one of the leading authorities relied upon. This case was followed and the same doctrine announced in *Territory of New Mexico* v. *United States Trust Co.*, 174 U. S. 545, 43 L. Ed. 1079.

In C. & A. R. Co. v. People, 98 Ill. 850, 856, it was said:

> "We can see no reason why the term 'right of way' should be confined to the land over which the main track of a railroad should be constructed. The land upon which a side-track, a switch or a turnout is built and in actual use by the company in the business for which it was organized, for all practical purposes is as much held for right of way as is the land upon which the main track is constructed. In the operation of a railroad it is necessary that trains should pass each other, and hence the necessity of turnouts, switches and side tracks. In the loading of cars, the making up of trains, and in innumerable other instances that might be named, in the prosecution of its business as a common carrier, side-tracks, switches, and turnouts are as indispensable to a proper transaction of its business as the main track itself. We are, therefore, of the opinion that the land held and in actual use by a railroad company for side-tracks, switches and turnouts must be regarded, within the meaning of the revenue law, as a part of the right of way of the company. It is used in the transportation of freight, and also for the purpose of carrying passengers, alike with the land upon which the main track is constructed; and upon what principle the land upon which the main track is laid can be held to be a right of way, and the land over which a side-track, switch or turnout passes can be termed something else, we are at a loss to understand."

So in *Lake Erie & W. R. Co.* v. *Middlecoff*, 150 Ill. 27, 37 N. E. Rep. 660, 663, it was decided:

"The right of way of a railroad company over and upon the street in a city includes all that part of the street held and in actual use by such railroad company for its main track, side-tracks, switches, turnouts, that is in any wise connected with its main track, and used by such railroad company for loading and unloading cars, or for storing cars."

In *Plafi* v. *Terre Haute & I. R. Co.*, 108 Ind. 144, 148, 9 N. E. Rep. 93, 95, it was said:

"The term 'right of way' is not limited by any statutory definition, nor by any statutory provision to a strip of land of any particular and definite width at all points on the line of the railroad. As applied to a railroad company, it means a way over which the company has the right to pass in the operation of its trains. Williams v. Railroad Co., 50 Wis. 76, S. C. 5 N. W. Rep. 482. A railroad cannot be operated with anything like success with a single track. It is necessary to have either a double track, or turnouts and sidetracks, in order that trains going in opposite directions may pass. It is just as necessary that there shall be turnouts and side tracks for the making up of trains, the changing of engines, the replenishing of them with water and fuel, and the loading and unloading of freight. With many of the important lines, it is often necessary to have many of such turnouts and side-tracks, in order that the business may be done with dispatch, in obedience to the demands of commerce and traffic. These side-tracks, such as are required at commercial centers and the larger cities and towns, could not be crowded upon a narrow strip of land, such as may be sufficient between stations. In order that the company may have the requisite amount of side-tracks at such points, it is necessary that it shall have a right of way over a sufficient amount of land upon which to lay and operate them. This right of way the company may

> acquire by condemnation proceedings if necessary. Rev. St. 1881, Sec. 3907. When such right of way is acquired, by whatever means, the land thus acquired becomes a part of the company's right of way, * * * as much as that portion occupied by the track."

Judge Sanborn recognized the force of these cases by (162 Fed. Rep. 849, 852; Rec. 605-606) saying:

> "The ordinary signification of the term 'right of way', when used to describe land which a railroad corporation owns or is entitled to use for railroad purposes, is the entire strip or tract it owns or is entitled to use for this purpose, and not any specific or limited part thereof upon which its main track or other specified improvements are located."

He, however, failed to apply this rule to the industrial tracks which the Wabash Company had constructed, in some instances paying for the material, and which it was "entitled to use."

From these authorities it is clear that the right of way which the Colorado Company is entitled to use is the entire property of the Wabash Company between the north line of Forest Park and 18th Street, including its facilities. The right to use is as broad as the necessities of a railroad. The word "use" is not new to the law books. In the civil law a use is defined as "the right which a person has to use or enjoy the property of another according to his necessities." (*Mulford* v. *LeFranc*, 26 Cal. 88.)

In *Brunson* v. *Marton*, 152 Ind. 111, 118, 52 N. E. Rep. 599, 601, 602, it was said:

> "As a general rule, the use of a thing does not mean the thing itself, but means that the user is to enjoy, hold, occupy, or have in some manner the benefit thereof. See Anderson's Dictionary of Law, p. 1069. If the thing to be used is in the form or shape of real estate, the use thereof is its occupation or cultivation, etc., or the rent which can be obtained for its use."

In *Snow* v. *Columbian Ins. Co.*, 48 N. Y. 624, it was said:

> "'To use' means to employ, to hold, to occupy, to enjoy, or to take the benefit of, as a chair, a book, or possess a harbor. In connection with the word 'port' it means to go into a harbor or haven for shelter, for commerce, or for pleasure, and to derive a benefit or advantage from its protection."

It follows, therefore, that the use of the right of way was not limited to the use of a specific strip of land acquired for railroad purposes, but included the right to the terminal facilities adjacent thereto and connected therewith, especially as they were either built by or under contract with it, for its use with and as part of its railroad and parts of them were actually upon that specific strip.

No appeal was prosecuted by the Wabash Company, so it is concluded by everything decided against it. It is familiar law that there can be, in the absence of a cross appeal, no modification of a decree in favor of an appellee.

In *Chittenden* v. *Brewster*, 2 Wall. 191 17 L. Ed. 839, 841, Mr. Justice Nelson said:

> "But here the complainants only have appealed, and the rule is settled in the appellate court,

that a party not appealing cannot take advantage of an error in the decree committed against himself, and also, that the party appealing cannot allege error in the decree against the party not appealing. *Kelsey* v. *Western*, 2 N. Y. 505; *Norbury* v. *Meade*, 2 Bligh, 261; *Mapes* v. *Coffin*, 5 Paige, 296; *Idley* v. *Bowen*, 11 Wend. 227. If the appellees desired to avail themselves of this error in the decree, they should have brought a cross appeal. By omitting to do so, they admit the correctness of the decree as to them. The case stands before the appellate tribunal the same as if the error had been waived at the hearing."

The same rule was announced in the main case (138 U. S. 1, 47, 48) 34 L. Ed. 843 thus:

"The Circuit Court having adopted the rate of compensation insisted upon by the appellants, and the Colorado Company not having taken an appeal, the question of the rate of compensation is concluded between the parties."

The only point therefore for this Court is whether the Colorado Company should have been excluded from the use of those parts of the industrial tracks which were not actually upon the particular strip of land commonly called the right of way.

(7) IF THE PROVISIONS OF THE ORIGINAL TRIPARTITE AGREEMENT WERE NOW BEING ENFORCED, THE CONSTRUCTION OF THE PARTIES AS TO THEIR RIGHTS WOULD BE CONCLUSIVE.

We have already shown that for over sixteen years rent, taxes and repairs were charged and paid upon the basis that there was the right to the *entire use* of the *entire* right of way and *terminal* facilities, without any limitations as to the width or character thereof. Be-

sides a large rental was, as hereinafter shown, obtained by claiming a valuation of the entire property as a whole railroad proposition. Such being the construction of the parties to an *executory* contract, a court should adopt it as conclusive.

In *Chicago* v. *Sheldon*, 9 Wall. 50, 54, 19 L. Ed. 594, 596, 597, Mr. Justice Nelson said:

> "In cases where the language used by the parties to the contract is indefinite or ambiguous and, hence, of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence. The interest of each, generally, leads him to a construction most favorable to himself, and when the difference has become serious, and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But, in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one."

In *Topliffe* v. *Topliffe*, 122 U. S. 121, 30 L. Ed. 1110, 1114, Mr. Justice Matthews said:

> "The operations of the parties in the manufacture and sale of the article were carried on, and continued to enlarge and prosper, and became profitable; and the parties throughout acted upon the assumption and understanding that the article thus manufactured was the article contemplated by the contract between them. If there were any doubt or ambiguity arising upon the words employed in the clause of the contract under consideration they would be effectually removed by this practical construction continuously put upon them by the conduct of the parties for so long a period."

Central Trust Co. v. *Wabash, etc. R. Co.*, 34 Fed. 254, 255, 256, 257, 258 involved a construction of the contract to use this same right of way. Judge Thayer said:

> "The fact that the St. Louis, Kansas City & Northern Railroad and its successors, while acting under the contract, paid mileage on all the intervenor's freight, baggage, and passenger cars until June, 1885, and that mileage was thereafter paid by the receivers on freight cars, creates a strong presumption that the payment of such mileage was within the contemplation of the parties who made the contract, and that, as they construed it, the contract required the payment of such mileage, either by reason of some provisions of the agreement, or because of some usage applicable to the subject-matter of the contract, in the light of which they supposed that the contract ought to be, and would be, interpreted. The agreement being executory, the practical construction adopted by the parties thereto, and by their successors, during a period of several years, is entitled to great, if not controlling, influence in determining what is the proper interpretation of the same, as was held in *Topliff* v. *Topliff*, 122 U. S. 121, 7 Sup. Ct. Rep. 1057, and *Chicago* v. *Sheldon*, 9 Wall. 54. It is well understood that the practical construction of a contract adopted by the parties thereto will not control or override language that is so plain as to admit of no controversy as to its meaning. In all such cases the intent of the parties must be determined by the language employed rather than by their acts, but if the language employed is of doubtful import, or if the contract contains no provisions on a given point, or if it fails to define with certainty the duties of the parties with respect to a particular matter or in a given emergency, then beyond all question it

is proper to consider how the parties have construed the instrument with respect to such debatable points. If both parties to an agreement for a considerable period, and while free to act, treat a contract as imposing certain duties or obligations, such conduct ought to settle the construction of the instrument if its provisions with reference to such matters are to any extent uncertain, obscure, or incomplete. 'A construction of a contract adopted and acted upon by both parties, will be regarded as worked into the contract', says Dr. Wharton in his work on Contracts, vol. 1, §206, if such construction does not conflict with its express provisions. The manner in which a construction of a contract adopted and acted upon by both parties may, so to speak, be worked into a contract, is well illustrated in *Topliff* v. *Topliff*, above cited, and also in the case of *Robinson* v. *U. S.*, 13 Wall, 363. In the latter case Robinson had contracted to deliver a certain quantity of barley, but whether the delivery should be made in bulk or in sacks was not specified. For a period of six months the barley was delivered in sacks. The court refers to this fact as a proper reason for construing the contract as requiring a delivery in sacks, rather than in bulk. It will rarely be found we apprehend, that a court will go far astray in arriving at the actual intent of the parties to a contract (which, after all, is the purpose of all rules of construction) by adopting that interpretation which the parties, without compulsion, have themselves adopted and acted upon. * * *We refer to the controversy between counsel as to the proper interpretation of the contract, not with a view of deciding which interpretation ought to prevail if the question was *res integra*, but as evidence of the fact that the contract considered by itself is fairly susceptible of different interpretations, because it does not in terms provide how cars shall be obtained or supplied for the use of

the joint line. Such being the case, and a controversy having now arisen as to the construction of the agreement, we have no doubt that we are authorized to settle the controversy by adopting that construction which the parties themselves adopted and acted upon invariably for a series of years."

In *Long-Bell Lumber Co.* v. *Stump*, 86 Fed. Rep. 574, 578, 579, 30 C. C. A., 260, Judge Philips said:

"There is no better established rule, or one more instinct with the spirit of equity, in the construction of contracts wanting in perspicuity or clearness of meaning, than to adopt that which the parties, by their course of dealing, placed upon it before any controversy arose between them. 'In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling, influence. The interest of each generally leads him to a construction most favorable to himself, and when differences have become serious, and beyond amicable adjustment, it can be settled only by arbitrament of law. But in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur there can be no great danger in the adoption of it by the court as the true one.' *Chicago* v. *Sheldon*, 9 Wall. 50, 54; *Topliff* v. *Topliff*, 122 U. S. 131, 7 Sup. Ct. 1057. 'Courts may use the actual construction put thereon by the conduct of the parties under the contract as a controlling circumstance to determine the construction which should be put upon the contract in enforcing the rights of the parties.' *Thomas* v. *Railway Co.*, 81 Fed. 919; *Sanders* v. *Munson*, 20 C. C. A. 581, 74 Fed. 651."

In *Ill. Trust & Saving Bank* v. *Arkansas City*, 22 C. C. A. 271, 76 Fed. Rep. 271, 292, Judge Sanborn said:

> "These parties construed this contract themselves before any controversy arose over it. One party constructed, and the other accepted, under the contract, pipes and hydrants, which could not stand the test of section 9 of the ordinance. They thereby themselves held that such test had no relevancy to the extended pipes and additional hydrants, and their view was undoubtedly right. 'In an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one.' *City of Chicago* v. *Sheldon*, 9 Wall. 50, 54; *Topliff* v. *Topliff*, 122 U. S. 121, 131, 7 Sup. Ct. 1057, 1062; *Leavitt* v. *Investment Co.*, 12 U. S. App. 193, 4 C. C. A. 425, and 54 Fed. 439, 444."

In *Thomas v. R. Co.*, 81 Fed. Rep. 911, 919, Judge Taft said:

> "It is well settled that, where the construction of a contract is doubtful, courts may use the actual construction put thereon by the conduct of the parties under the contract as a controlling circumstance to determine the construction which should be put upon the contract in enforcing the rights of the parties."

In *New Orleans, etc. R. R. Co.* v. *Meridian Water Works Co.*, 18 C. C. A., 519, 72 Fed. Rep. 227, 232, Judge Boarman said:

> "If the terms of the contract are ambiguous or indefinite, and hence of doubtful character, the particular construction by the parties themselves is entitled to great if not controlling, influence."

In *Mct. Nat. Bank* v. *Benedict Co.*, 20 C. C. A. 377, 74 Fed. Rep. 182, 185, Judge Caldwell said:

> "But, if its meaning was doubtful, the fact that the parties to it understood it to be a contract of bailment, and acted upon that assumption, would remove the doubt. * * * * Moreover, parties have the undoubted right to make their own contracts, and to put their own construction upon them, and to regulate their rights and liabilities thereunder. If the court 'leaves the parties to be governed by their understanding of their owa language, it, in effect, enforces the contract as actually made. That they should be so permitted to construe their own agreement accords with every principle of reason and justice.'"

In *Fox Solid Pressed Steel Co.* v. *Schoen*, 77 Fed. Rep. 29, 30, Judge Acheson said:

> "Moreover, the practical interpretation by the parties of an ambiguous clause of a contract is entitled to great, if not controlling, influence (*Topliff* v. *Topliff*, 122 U. S. 121, 7 Sup. Ct. 1057); and such practical construction, though at variance with the literal meaning of the clause, will prevail (*District of Columbia* v. *Gallaher*, 124 U. S. 505, 8 Sup. Ct. 585)."

In *Sanders* v. *Munson*, 20 C. C. A. 581, 583, 74 Fed. Rep. 649, 651, it was said:

> "Ambiguities in the terms of a contract are often dispelled by the construction which parties themselves have placed upon the terms before controversy has arisen, and courts frequently give effect to this construction, and adopt the meaning which the parties have assumed to be correct."

In *Leete* v. *Pacific Mill & Mining Co.*, 88 Fed. Rep. 957, 967, 968, Judge Hawley said:

"As the references made to this money in the correspondence are to some extent uncertain, indefinite, and doubtful, I am of opinion that the subsequent acts and conduct of both parties, in so far as the same tend to shed light upon the transaction leading up to, and culminating in, the execution of the deed, is admissible in evidence, and should be considered by the court,—not as creating a new contract, but as tending to show what the contract and understanding of the parties were at the time of the delivery of the deed. From the subsequent acts and conduct of the parties, it is made perfectly clear that at the time of the execution of the deed the defendant did not assert any claim to this money."

In *St. Joseph Union Depot Co.* v. *Chicago, etc. R. Co.*, 32 C. C. A. 284, 89 Fed. Rep. 648, 657, Judge Shiras said:

"Thus, it appears that all the railway companies, including the defendant herein, have acquiesced in the practical construction put upon the contracts between the Depot and the Railway Companies by the executive committee in charge of the rebuilding of the depot, to the effect that the erection thereof formed a part of the repairs of the premises, of which the cost was apportionable between the several railway companies; and it is a familiar rule that when the parties, by their own acts, have put a practical construction upon the terms of a contract existing between them, courts will usually adopt and enforce such construction."

In *Lyman* v. *K. C. & A. R. Co.*, 101 Fed. Rep. 636, 641, Judge Philips said:

"No better or safer rule has been established for the construction of a contract than that placed upon it by the conduct and acts of the parties themselves before any controversy arose between them."

In *Fitzgerald* v. *First National Bank*, 52 C. C. A. 276, 114 Fed. Rep. 474, 478, Judge Sanborn said:

> "And the practical interpretation given to their agreements by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent."

Having thus seen that if the Colorado Company were, as an original proposition, asserting its rights under the tripartite agreement, it would not be limited in the use of, nor to the specific strip, but would have the right to use the entire property and its terminal facilities, we turn to the proceeding in the Main Case to see if the question has not already been concluded by what has been there decided, and by the position there assumed by the parties.

III.

THE RIGHT TO USE THE TERMINAL FACILITIES IS RES ADJUDICATA.

(1) Master's Report was, at the Insistence of Wabash Company, Directly Contrary to its Present Contention.

Upon the trial the representatives of the Wabash Company insisted that the value should, without regard to width, include the entire road and all terminal facilities. The Master's reports clearly so show. In the first report (Rec. 140-145) this is made quite plain, in this language, the italics being ours:

> "If the intervenor is entitled to the use of the Wabash right of way and tracks, what would be a fair and equitable compensation for the use there-

of? The order of reference herein requires me to report a sum that would be a fair and equitable compensation for the use of the right of way and tracks of the Wabash, St. Louis & Pacific Railway Company, as prayed for in the bill of complaint. On this question there is such a conflict of testimony as to be almost impossible to arrive at a basis. The complainants' counsel claims that the true measure of compensation is first to *find the cost of the track and right of way in question* and to allow interest on this sum at the rate of six per cent per annum, the legal rate of interest in Missouri, and to add to this the cost of maintenance, and then to divide this sum on a wheelage basis; that is to say, in proportion to the number of cars run by each road over said track; settlements to be made on this basis every thirty days.

On the other hand, *the Receiver's counsel claim* that a fair and equitable compensation is to *value the right of way and tracks* proposed to be used at their present value *as a railroad*, to allow interest on this value at six per cent, and to require the St. Louis, Kansas City & Colorado Railroad to pay one-half of said interest and to pay in addition thereto their proportion of the cost of operating and maintenance of said right of way and tracks on a wheelage basis. In support of their theory the complainants' counsel introduced testimony of S. T. Emerson, the chief engineer who built the St. Louis, Kansas City & Northern Railroad from Ferguson through the park to the Union Depot. He stated that the cost of the *whole* of said branch road was $840,000.00, including the right-of-way and everything, and that that *portion of the road* from Eighteenth Street or the Union Depot to the north line of the park cost $360,000.00 (p. 9). That he had recently examined the track, and that the superstructure, the ties, iron, etc., had greatly depreciated in value and that the depreciation

amounted to about fifty per cent. (p. 13.). That the difference in the value of the track as it is now and its cost in the first instance was about $25,000.00 less on account of the depreciation, and that the superstructure originally cost about $40,000.00. Deducting this depreciation at fifty per cent. $20,000.00, from the original cost, would leave $320,000.00. He also testifies that the cost of maintaining a mile of single track railroad, such as the Wabash, would not exceed $600.00 per mile a year. Taking this basis, four miles and 224 feet, for maintenance per year, would be about $2,400.00 (p. 16). Mr. Emerson has been in the railroad business as an engineer, partly in operation and partly in construction, for 34 or 36 years, and he gives his opinion that a fair and equitable compensation in a case where one railroad has a right under a contract to use the track of another, would be to divide, on a wheelage basis, the interest on the first *cost of the property* and the cost of maintenance (p. 16). With a settlement every thirty days (p. 20). On cross-examination he says (p. 22) that he arrived at the cost of the road by taking the amount of money he had spent in construction, and consulting the Auditor as to the balance of the money that had been expended, but could not detail how much was for right-of-way, and how much for construction. He says (p. 23) that this was the cost of the road up to about July, 1876, and does not include the subsequent cost. On the other hand, Col. How, the general agent of the Receivers of the Wabash, states, that (p. 91) he was connected with the St. Louis, Kansas City and Northern Railroad as Secretary and Vice-President, and that it was his duty to approve vouchers and keep himself posted with respect to the *cost of that railroad* between the Union depot and the north line of the park, and that his recollection is that it cost between $1,000,000.00 and

$1,100,000. That the *whole cost* from Ferguson into the Union Depot was $1,250,000.00, and that a liberal estimate of the cost from the north line of the park to Ferguson would not exceed $250,000.00 (p. 91).

It is also in evidence that subsequent to the original building of this branch, the St. Louis, Kansas City and Northern Railroad and *the Wabash road have acquired other property on which they built side tracks, switches and other things necessary for the operation of their road.* As both these gentlemen are supposed to be in a position to know the cost, and as one limits the cost to about July, 1876, it is possible that the difference arises from the sum spent after that date. In regard to the present *value of the railroad* there is the same conflict of testimony. Col. Talmage, the General Manager of the road for the Receivers, testifies that some time ago at the request of the C. B. & Q. road for an entrance into the city over these tracks, he had his engineer go over the *value and costs of the property* and got up the figures, and went over the same with him, and that he considered the *present value of the property* to be between $1,250,000 and $1,500,000 and he based this *estimate upon the property* having been purchased some time ago, and without improvements with which a similar right-of-way, parallel, would be burdened. He states (p. 77) that he would consider a fair valuation of the right-of-way and superstructure of the Wabash Railroad from the north line of the park to the Union Depot *with such appurtenances* as are necessary to operate it as a railroad in the City of St. Louis, side-tracks, etc., to be worth at least $1,500,000 (p. 77). *He says* (p. 80) *this valuation includes* the property between the west line of the park and Union Depot; that is, *the real estate and tracks, the side tracks laid thereon, and other appurtenances necessary for*

doing business. He states (p. 82) *that the reason the whole property should be taken in the value is that you cannot do business without the sidings, switches, etc., for the purpose of storing, loading and unloading cars.* Col. How in his testimony values the line as it stands today, including the right-of-way *and superstructure and necessary appurtenances*, from the north line of the park to the Union Depot at $1,800,000 and that if a new line were to be built it would cost fully $2,500,000 (p. 91). On the other hand the intervenor introduced Julius Pitzman, John Grether and L. B. Jones, who are generally familiar with the values of real estate in the city of St. Louis, who put the value on a strip of ground thirty feet wide as it appears on the plat, Chart A, extending east of Forest Park thirty feet wide to Tayon Avenue (p. 108) at $265,141.00. This is of the real estate alone, simply considered a vacant land, level with the streets, thirty feet wide. These witnesses detailed the manner in which they arrived at this estimate, and said that it does not include anything except the actual value of the land, nor what the railroad might have paid for damage, for adjoining property, nor any of the superstructure, nor improvements thereon. *There was no estimate of value of the railroad as a railroad given by any one except Mr. Talmage and Mr. How.* There is quite a wide divergence between the witnesses for the intervenors and the Receivers as to the method of arriving at an apportionment between the two companies. Col. Emerson states that it should be divided on a wheelage basis solely. J. B. Vandyne, who has been in the railroad business since 1855, and has been General Superintendent since 1861, states that in a case where one road by contract has a right to run over the tracks of another it should be divided on the wheelage basis, taking into consideration the maintenance of the road, the interest on the cost of the

road, and he gives instances (pp. 45 and 46) where this basis is adopted between roads. In answer to a question by the Master (p. 47) he states that an additional element to be considered is the value of the track itself. Charles H. Sharman, who is the Superintendent of the Illinois and St. Louis R. R. in East St. Louis, and who is familiar with instances in which railroads run over the tracks of other roads, after stating instances, states that in his opinion a mode of arriving at a fair and equitable basis would be to take into consideration the value of the tracks to be used jointly, in relation to what it cost, and then agree upon a percentage to be paid on that, and add to that amount the cost of maintenance of the tracks and prorate that. That he would allow six per cent on the cost, and divide the whole on the basis of wheelage (p. 50), and that he knows of no more equitable way of arriving at compensation than the wheelage basis (p. 51). In answer to a question by Judge Hough (p. 57) he states that to some extent the value of the right-of-way at the time the road was to be used by the other road ought to be taken into consideration. On the other hand, Col. Talmage and Col. How who were fully as competent as railroad men as the other witnesses, state that the proper way to ascertain the equitable consideration to be paid by one road for the use of another's tracks is to value the right-of-way and track *and its appurtenances* and to require the entering road to pay one-half the interest per annum on this valuation, and in addition thereto to pay on a wheelage basis the maintaining and operating expenses of the right-of-way track. Both of these gentlemen gave numbers of instances connected with the Wabash property in which this basis has been adopted; sometimes the Wabash paying this consideration and sometimes receiving this consideration from other roads. Considering all the circumstances

surrounding this case, the Master is of the opinion that neither of the bases contended for respectively by the intervenors and receivers is correct. It would be manifestly unjust to permit one road to use the property of another by simply paying interest on the original cost years ago, when the property itself might have increased in value to an enormous extent, and the cost of similar facilities to be purchased or condemned anew for the purpose of the entering road would be increased corresopndingly. The change of circumstances, the increased facilities of business, the connections, the increased business itself, are all factors in the problem. It would be manifestly unjust to require a road using the track one-tenth as much as the other to pay one-half of the fixed charges or interest on the value, especially where the contract provides for the use of the road by even other roads than the Wabash and the intervenor. The intervenor must be considered in this matter not simply as a road twenty-one miles long, but a road running throughout the whole length of its projected route, as good faith requires sooner or later it should be built, and with it would come increased business and use of the track. Endeavoring to extract from the contradictory views and testimony on these points some basis which may be equitable, I think it would be proper to adopt as a basis the present value of the property sought to be used, to allow interest on this sum at the legal rate of interest in the State of Missouri, to-wit: six per cent., to add to this the actual expenses of repairs and maintenance of the right-of-way and tracks and the operating expenses of these tracks, and to divide the whole on a wheelage basis, charging each road in proportion to the number of cars and locomotives run over the tracks by each, the Wabash road to keep an accurate account of such maintenance and operating expenses, and each road to keep an accurate account of

the number of cars and locomotives run over said tracks by each, and settlement to be made every thirty days between the companies. For the purpose of ascertaining the amount of interest to be paid, I think, from all the testimony, that a fair valuation of the right-of-way and tracks sought to be and necessary to be used should be fixed at $1,000,000. If the Court prefers to fix the operating and maintaining expenses at a given sum, I find from the testimony that $600.00 a mile per annum is a fair estimate of such expenses, which would be $2,400.00 a year, for the property sought to be used. In arriving at this conclusion, I considered the fact that it could only apply temporarily, until the Court can be fully informed as to the value, and as to the equity of the suggested basis of division on the final hearing. This question is practically a question of fact to be decided from all the circumstances of the case as to what would be fair and equitable."

In the second report (Rec. 224) the idea was by the Master thus emphasized:

"On the final hearing additional evidence was offered as to the proper measure of compensation, and also as to the value of the real estate occupied by the railroad from the north line of Forest Park to Eighteenth Street. *The testimony as to the value of the real estate does not include the superstructure or terminal facilities occupied by the Wabash which the testimony of Mr. Talmage shows would be necessarily used if the intervener had the right to use the Wabash tracks.*

After due consideration of this new testimony, I am inclined to think that my original valuation of the track and *right-of-way* sought to be used was equitable and proper under the circumstances."

There can, therefore, be no doubt that the rental fixed by the Master was based upon a valuation of the

entire property with *all its terminal facilities* regardless of width, and that the purpose was to require the Colorado Company to pay for the equal use thereof.

(2) THE EXCEPTIONS OF THE WABASH REPRESENTATIVES CONCEDED THAT THE VALUATION SHOULD INCLUDE THE TERMINAL RIGHTS AND FACILITIES.

The Colorado Company filed no exceptions to the Master's report. The Wabash Company, its receivers and mortgage trustees, however, filed exceptions (Rec. 225-234), the eleventh and twelfth (Rec. 232-234) of which alone referred to the compensation. They read:

"XI.

1st. The Master erred in finding that the *value of defendant's railroad and right-of-way* through the park and up to Eighteenth Street in the city of St. Louis, was only one million dollars; whereas, the evidence of J. F. How and A. A. Talmage shows a cost and value of the same, *for railroad purposes*, to be a million and a half of dollars.

2nd. The Master erred in finding, upon evidence, that an equitable basis of compensation for the use of the defendants' right-of-way *and property* from the north line of Forest Part up to the terminus of said line at Eighteenth Street would be to allow interest on the value of said right-of-way and tracks at the rate of six per cent per annum, and by adding to this the actual expenses of repairs and maintenance of right-of-way and tracks, and the operating expenses of the tracks, and dividing the whole on a mileage basis, charging each road in proportion to the number of cars and locomotives run over the tracks by each, when the evidence of Messrs. Talmage and How shows the proper and equitable basis of compensation in such cases to be to allow interest at a reasonable rate on the value of the property, to-wit: one million five hundred thousand dollars,

and charging each of the two companies using the property with one-half the amount thereof and then by distributing or dividing the actual expenses of repairs and maintenance of right-of-way and tracks, and the operating expenses of the property, upon a wheelage basis, charging each company with such a proportion of the total expenses for operating, maintaining, improving and repairing said right-of-way, *tracks and property* as the number of its locomotives and cars run over said property may bear to said total expenses.

3d. Because the compensation recommended by the Master is insufficient.

4th. Because the Master erred in refusing to find that the measure of compensation, and mode of ascertaining the same, suggested by defendants, and supported by testimony of How, Talmage and other witnesses, is proper, equitable and just."

"XII.

1st. The Master erred in admitting the testimony of Andrew McKinley as to his construction of the tripartite agreement, and in permitting him to state the purposes he had in view, as President of the Board of Park Commissioners, in making the same.

2nd. The Master erred in admitting the testimony of J. B. Vandine, C. H. Sharman, J. W. Paramore and other witnesses, as to what would, in their opinion be a fair and equitable compensation for the use of defendants' right-of-way through the park, and up to the terminus of the line at the Union Depot in St. Louis, when it was not shown that any of said witnesses were competent or qualified to testify concerning the subject matter.

3d. The Master erred in admitting the testimony of Pitzman, Grether, Jones and others, as to

the value of defendants' right-of-way and property in question for railroad purposes, because it did not appear that said witnesses were qualified to testify concerning the subject matter and because their testimony as to the value of said right-of-way for other than railroad purposes was incompetent and irrelevant.

4th. The Master erred in admitting the agreement made October 29th, 1872, between the Commissioners of Forest Park and the St. Louis County Railroad Company, because the act under which said Commissioners were appointed and acted was unconstitutional and void.

5th. The Master erred in admitting the tripartite agreement in evidence, as it purported to affect an interest in land, and was not acknowledged or proved, as required by statute.

6th. The Master erred in admitting, against respondents' objections, certain immaterial, incompetent and irrelevant testimony.

7th. Because the findings of the Master are against the law and the evidence.

8th. Because the findings of said Master are inequitable and unjust."

Paragraph 1 of Exception XI distinctly asserts that the value was to be fixed of the entire property and appurtenances "for railroad purposes," and, although the Master fixed the value *for such purposes* higher than the estimates of the witnesses for the Colorado Company, the Wabash Company wanted a higher valuation. This was a plain admission that the value was to be fixed for *all* railroad purposes. Paragraph 2 of the same exception insisted that the value of the use should be divided *equally* between the two companies. The

plain meaning of the two paragraphs is that both companies were to have the equal use of the *whole* property for railroad purposes. This conceded the full right to use *all terminals* and *all property*. Paragraph 3 of exception XII confirms this view, because it sought to strike out the testimony of the witnesses for the intervenor for the reason that the valuations were *not* for railroad purposes.

(3) TESTIMONY OFFERED BY THE WABASH COMPANY SHOWS THAT THE RIGHT TO THE USE OF THE TERMINALS WAS TO BE ACQUIRED.

(a) As hereafter shown, both Col. Talmage, General Manager of the Receivers, (Rec. 97-98), and Col. How (Rec. 111), their General Agent, expressly refused to limit the right of way to any strip, and, as we shall now see, the Wabash Company obtained the valuation upon which was based the rental charge, by claiming that the whole property and all terminal facilities were to be included.

(b) The Master was right in saying that Col. Talmage, General Manager of the Wabash (Rec. 94-104), and Col. How, General Agent of the Receivers (Rec. 104-115), based their valuation *on the railroad as a whole, including appurtenances and terminal facilities.* Some extracts from the examination of Col. Talmage (Rec. 95, 97, 98-100, 102-103, 147, 149-150, 155) will show the trend of the testimony and the claim then made:

> "Q. What would you consider a fair valuation of the right of way and superstructure of the Wabash Railway from the north line of the park to the Union Depot *with such of its appurtenances as are necessary to operate it as a railroad in the city of St. Louis?*

Counsel for the intervenor objects to the question, as intervenor is not asking for the appurtenances.

The Master: *What do you mean by appurtenances?*

Mr. Blodgett: *I mean side tracks and such conveniences as are necessary to have in order to operate it as a railroad.*

The Master overrules the objection, stating that counsel can limit the matter in cross-examination if they desire.

A. I consider *that property* worth at least a million and a half.

Q. What do you include in that valuation?

A. I include the track, the main tracks and the side tracks.

Q. Does that include *all the property* of the Wabash in the Union Depot? A. *It includes the property between the west line of the park and the Union Depot, that is, the real estate and tracks, the side tracks laid thereon, and other appurtenances necessary for doing business.*

By the Master:

Q. Can you give me the value, or the approximate value, of the right of way and the main track from the north line of the park to Eighteenth Street and the Union Depot? A. I thought I had covered that in my testimony.

Q. You included the sidings? A. Oh, you mean the main track, stricken out from the sidings?

Q. Yes? A. *I couldn't do that without going into a calculation. We could not operate without the sidings, we could not pass trains nor take care of trains after receiving them, nor make them up to go out, without the sidings.*

Q. Would that be so with another road that would run over your track? A. Yes, sir; we would have to have additional track room if there was another road. We have not enough now to warrant our bringing another railroad in and be able to handle the trains successfully outside of loading and unloading of freight. I mean simply to pass trains, putting additional trains on the track, *taking care of them after they arrive here, making them up ready to go out, and the storing of cars; you can't do business without having some place to put your loads, and some place to put your empties away, some place to hold them to unload when people are not ready to unload them:* and the facilities are not sufficient here now to admit of our taking any more business without acquiring more property. *That is why I say the whole property wants to be taken in the valuation.*

By Mr. Priest:

Q. As an illustration, we will say that the St. Louis and San Francisco Railway Company desires to obtain the use of that part of the line of the Missouri Pacific Railway from Kirkwood into St. Louis to the Union Depot. The ordinary and usual arrangement that would be made between the two companies would be first to agree on the value of the Missouri Pacific line from Kirkwood into the Union Depot? A. Yes, sir.

Q. Suppose that value was two million of dollars; you would count that as one factor of the fixed charges, would you not? A. Yes, sir.

Q. What other factor would be added to that as a fixed charge? *A. The necessary terminals that must be used here in order to bring those trains in and prepare them to go out."*

Great weight should be attached to the statement of Col. Talmage. It shows that regardless of any knowledge he may have had as to the meaning of the word

"appurtenances," he was giving the value of the entire property and seeking to obtain a rental based upon such valuation. The word "appurtenances" when used by one as learned as Col. Blodgett in response to the direct question of the Master, was doubly significant, because he was thus re-enforcing the idea which Col. Talmage was endeavoring to present, and he knew that the word "appurtenances" included every railroad facility connected with the railroad property. So, if for any reason the word "right-of-way" should be held to have a restricted or limited meaning; "right-of-way and appurtenances" between certain points necessarily include the whole railway property, and such must have been the sense in which the word was used.

In *Missouri Pacific Railway Company* v. *Moffet*, 94 Mo., 56, 60, it was said:

> "Land, ordinarily, cannot be appurtenant to other lands or distinct parcel, or pass with it, as a part of it, or belonging to it, but here it is one contiguous adjacent piece, given and donated to the railroad in one and the same instrument. The word, appurtenant, has no inflexible meaning, but must be construed in connection with the nature and subject of the principal thing granted."

(c) That the valuation was not limited to any specific strip is apparent from a statement made in the Main Case (Rec. 111) by Col. How, General Agent for the Receivers, in detailing how he made his estimate of the value of the property for the use of which the Colorado Company was to pay. He said:

> "Q. In speaking of that valuation did you value a strip of land 30 feet in width; did you put the value of a whole lot upon that? A. *Yes,*

sir; we generally found it necessary for us to buy a whole lot when we wanted to buy 30 *feet only. A road cannot get along with 30 feet running into the city of St. Louis, as it has to have side tracks, as Col Talmage explained in his testimony.*

"Q. You can put a side track on 30 feet, and you have done that in regard to the Wabash Railway?

A. Yes, sir; *but you have to have several side tracks running into town.*

"Q. You are using this now to Grand avenue, are you not? A. I don't think to Grand avenue; *we have more than 30 feet beyond Grand avenue.* After you get towards Rock Springs *then we have been using that.*"

Col. Talmage never intended to limit his valuation to any strip, for he, in the Main Case (Rec. 97-98) said:

"Q. You have valued this road between the north line of the park and Eighteenth street at from a million and a quarter to a million and a half dollars, I understand? A. Yes, sir.

"Q. What do you include in that valuation?

A. *I include the track, the main track and the side tracks.*

"Q. Does that include *all* the property of the Wabash in the Union Depot? A. *It includes the property between the west line of the park and the Union Depot, that is, the real estate and tracks, the side tracks laid thereon, and other appurtenances necessary for doing business.*

"Q. How much real estate has the Wabash road outside of this 30 feet of right of way? A. Not a great deal, *some fractional pieces; it was necessary to acquire them in order to get the right of way that was acquired.*"

"Q. Does this plat show them? You seem to have whole blocks here, nearly. Now, outside of this right of way, what is this real estate worth?

A. The bulk of them—I do not know whether that map is made up to the present time and shows the side tracks that are in there or not.

"Q. *Here is nearly a block of ground, I see?*

A. *Yes, sir; that is covered with tracks.*

"Q. *Those are side tracks for storing your cars?*

A. *For switching and handling trains. You can't run trains unless you have got a place to pass trains and put them out of the way or a place to put trains when they arrive here, so that you can handle them and sort out the cars and get them out of the way of trains going out. All this ground, nearly, is covered with tracks.*

"Q. Your company does a large business?

A. We do some considerable business."

(4) THE OPINION OF MR. JUSTICE, THEN CIRCUIT JUDGE BREWER.

Mr. Justice, then Circuit Judge, Brewer (29 Fed. Rep. 546, 554, 555; Rec. 304, 305-306, 456-457) thus dealt with the question:

"It is insisted that by this stipulation the Railroad Company agreed to permit the use of its right of way, and did not agree to permit the use of its track or road-bed, and that the road should not be bound, therefore, beyond the very letter of its obligation. * * * The language of the ninth paragraph, under which, as before noticed, intervenors must claim, is that the party of the second part shall permit other railroads to use its 'right-of-way.' Now the term 'right-of-way' has a two-fold signification—it sometimes is used to describe a right belonging to a party, a right of passage over any tract; and it is also used to de-

scribe that strip of land which railroad companies take upon which to construct their roadbed. Obviously, in this paragraph, it is used in the latter sense. Through both of these contracts the terms 'right-of-way,' 'track,' and 'road-bed' frequently appear, and in all cases the term 'right-of-way' is used as descriptive of the strip above referred to. Notably, in the fifth paragraph, is the distinction between 'right-of-way' and the 'track' disclosed, in which it is provided that the depot shall be wholly outside of the right-of-way, but immediately adjoining the track. Now, the right-of-way through the park, as given by the Griswold deed, was 40 feet; as fixed by the contract with the Forest Park Commissioners, was 70 feet; and by this present contract, 42 feet. So the County Road conveyed to the Kansas Road, outside of the park, a strip either 30 or 28 feet in width for its right-of-way. My thought, at first, was that the intervenors could only claim a right to use so much of this right-of-way as was not, in fact, occupied by the track of the Wabash, and that all that was intended by this ninth paragraph was to permit other railroad companies to occupy and use so much of the Kansas Road's right-of-way as it did not itself occupy and use; but, after reflection on the arguments of counsel, I have been led to the conviction that this was too narrow a construction, and was not the real intent of the parties. The Master, in his report, shows that the entire right-of-way is occupied by tracks and sidings, so that there is no room for another and independent track; and as there is nothing to show that this occupation has not been made in good faith, and to supply the needs of the Wabash Company, if my first interpretation had been correct, the intervenors would plainly be without any rights. I think, however, the true construction is this: that the Kansas Company was to have the

first right—a right not limited to its necessities, but as broad as its convenience. Subject, and only subject, to such prior right, other companies were to have the use of the right-of-way, and if the respondent's business compelled the occupation by its tracks or sidings of the entire right-of-way, but the convenience of its business would permit the use of those tracks and sidings by another road, then such other road would be entitled to the use of both the right-of-way and the tracks and sidings. This construction is, I think, in accordance with the obvious intent of the parties, who were contracting for general rights, and not fixing the specific details."

He subsequently put the matter beyond all doubt in sustaining the contention of the Wabash Company, that since the Colorado road obtained the equal use and benefit of the property as a railroad, it should pay one-half of the value of the use instead of paying, as the Master recommended, upon a wheelage basis or in proportion to the use. His language (29 Fed. Rep. 546, 559 Rec. 310) in this respect was:

"The final matter is that of compensation. In this I think the Master erred. He fixed the value of the right-of-way at a million of dollars; and reported that, in his judgment, the share of the interest on this value, and in the expenses of keeping up the track, which the intervener company should pay, should be fixed upon a wheelage basis. So far as respects the mere matter of keeping up the track I see no reason to doubt the justice of the rule fixed by the Master; but, in regard to the interest on the value, I think the intervener should pay one-half of that, and for these reasons: It is a familiar fact that in a large city like St. Louis, along the track of an important railroad, within the city limits, are built large manufactur-

ing establishments, warehouses, and other buildings, for the convenient transaction of business between the carrier, on the one hand, and the manufacturer and the merchant, on the other. Another road coming over the same track not only uses the property, of great value, which the company owner has in the first instance paid for, *but also shares in the benefit of access to all these manufactories, warehouses, etc.* It thus places itself in competition with the original company for this valuable business. Such competition may operate to diminish the business of the original company, or compel it to lower its rates to preserve the business. In either way, it operates to the serious detriment of the original company. The new company comes in as an equal competitor. It shares in all the benefits of this business, and it may share equally. Under those circumstances it seems to me no more than fair that a new company, which crowds itself *into an equal access* to such benefits and such privileges, should pay an equal share of the interest on the value of the property. Hence, I shall sustain the objections of the respondent to the report of the Master, so far as concerns the amount of the compensation, and I think that the intervener company must pay one-half the interest on the value, and its share of the cost of keeping up the track, determined upon a wheelage basis. In other respects, the report of the Master will be confirmed."

Can it be possible that the Wabash Company could, after thus getting the price to be paid, based upon the equal use of *all the railroad*, including terminal access to private industries and after collecting on that basis for sixteen years, be permitted to turn around and say there was only a limited right to a strip of narrow width?

5th. THE DECREE OF THE TRIAL COURT IS AS BROAD AS THE CONTENTION OF THE COLORADO COMPANY.

The decree (Rec. 4-7, 292-296), when read in the light of that which has already been narrated, is as broad as the contention of the Colorado Company. A few extracts therefrom may be quoted. Thus, in fixing the compensation, it (Rec. 293-294) recites:

> "And the Court finds, adjudges and decrees that the basis of compensation to be paid by the intervener, the St. Louis, Kansas City & Colorado Railroad Company, for the use of the right-of-way and the tracks, side-tracks, switches, turn-outs, turntables and other terminal facilities of said Wabash, St. Louis & Pacific Railway Company at and between the north line of Forest Park and Eighteenth Street in the city of St. Louis, shall be the value of said right-of-way, tracks *and other property last described*, as determined by the Master in his said reports; and the compensation to be paid shall be, per annum, six per cent on one-half of the value of said *right-of-way, tracks, side-tracks, switches, turnouts, turntables and other terminal facilities*, and the said one-half value is and shall be taken to be $500,000."

So, in dealing with the rules and regulations under which the Colorado Company was (Rec. 294) to use the property:

> "And the Court doth further order, adjudge and decree, that the running of all *trains*, engines or cars of said intervener, the said St. Louis, Kansas City & Colorado Railroad Company, over said right-of-way and tracks, and *the use of said right-of-way, road, terminal facilities and other property specified as aforesaid*, shall conform to the rules and regulations now in force, and such other reasonable rules and regulations as may hereafter

be adopted by the said Wabash, St. Louis & Pacific Railway Company, or its said Receivers, to enable said intervener to fully enjoy the benefits of this decree."

The injunctive portion of the decree (Rec. 295, 296,) provides:

"And the Court doth further order, adjudge and decree, that in all respects, subject to the terms of this decree, the said Railroad Company intervenor, shall enjoy *the equal use and benefit of said right-of-way, tracks, switches, side tracks, turnouts, turntables and other terminal facilities with said Wabash, St. Louis & Pacific Railway Company*, or its said Receivers, and the said Wabash, St. Louis & Pacific Railway Company, and Solon Humphreys and Thomas E. Tutt as such Receivers, and said Central Trust Company of New York, and James Cheney, and all persons claiming by, through or under them, and each of them respectively, and their agents, servants, counsellors and employes, be and the same are hereby perpetually enjoined and restrained from in any manner refusing to permit the said intervener, the said St. Louis, Kansas City & Colorado Railroad Company, its successors or assigns, and its or their officers, agents, and employees, from using with it or their engines, cars (loaded or empty), the said *right-of-way, tracks, switches, side-tracks, turnouts, turntables and other terminal facilities* of said Wabash, St. Louis & Pacific Railway Company between the north line of said Forest Park and said Eighteenth Street on the terms hereinabove set forth in this decree in and for the transacting of its or their business and in the operation of its or their road. And the said intervener, the St. Louis, Kansas City & Colorado Railroad Company, by its officers, agents and employees, and each of them, is hereby authorized

and permitted, with its right-of-way, road, tracks and property, engines and cars, loaded or empty, to make connection with said Wabash, St. Louis & Pacific Railway Company at the north line of said Forest Park, and *to use the said right-of-way, tracks, switches, side tracks, turnouts, turntables and other terminal facilities* of said Wabash, St. Louis & Pacific Railway Company, or any one claiming by, through or under it as to the same, between the north line of said park and Eighteenth Street, on the terms, in the manner and subject to the regulations in this decree set forth, in and for the transaction of the business and in operation of the road of said St. Louis, Kansas City & Colorado Railroad Company, its successors or assigns; and said Solon Humphreys and Thomas E. Tutt, receivers, and all agents, servants or persons by them engaged or acting with or for them; said Central Trust Company and James Cheney; said Wabash, St. Louis & Pacific Railway Company, and all persons claiming by, through or under said last named Company, are hereby restrained and enjoined from in anywise obstructing, preventing, interfering with or refusing to comply with the permit and privilege ordered, adjudged and decreed."

The language of this decree does not limit the right of way. If limited in that regard, many words thereof and provisions therein for the use of facilities are nugatory and useless. Exhibit D (Rec. 591) shows the land as it was (Rec. 27, par. 14) when the decree in the Main Case was entered and the dates of the construction of some of the industrial tracks. A comparison of Exhibit D (Rec. 592) with Chart A (Rec. 591) shows the same land, Chart A not showing, while Exhibit D does show, the tracks and facilities thereon. The decree gives the use of the "right of way, tracks, switches,

side-tracks, turn-outs, turn-tables, *and other terminal facilities.*"

Mr. Justice Brewer in his opinion (Rec. 305-306) said:

> "The master, in his report, shows that the entire right of way is occupied by tracks and sidings, so that there is no room for another and independent track."

It is also, therefore, manifest that the terminal facilities mentioned in the decree were not and could not all be on any specific strip. So, when the learned jurist (Rec. 310) increased the allowance of the Wabash Company on the ground that the Colorado Company crowded "itself into an equal access to such benefits and such privileges" as came from the use of the industrial tracks, he manifestly meant in the decree to include them therein by the use of the words "other terminal facilities", all parts of which could not possibly have been located on the strip which Judge Sanborn had in mind as an inspection of Exhibit D will show.

(6) The Contention of the Wabash Company in The Supreme Court.

In Col. Blodgett's printed argument (Rec. 29) in this Court he said:

> "V.
>
> THE COURT ERRED IN ENTERING A DECREE BROADER THAN THE CONTRACT.
>
> Even if the *ninth* clause of the tripartite agreement was binding on the Kansas City Company, it only reqired it to permit other railroads to use *"its right-of-way"* and yet a decree was entered

giving respondent the use of 'the right-of-way, tracks, switches, turnouts, turntables, and *other terminal facilities of the Wabash Company*' at St. Louis.

Again, the decree is not only broader than the contract, *but it is broader than the prayer of the petition.* The prayer of the petition is, that the Colorado Company be permitted to use the *right-of-way* of the Wabash Company, 'commencing at the north line of said park, thence over *said right-of-way* to Eighteenth Street in said city of St. Louis, by running its engines and cars over and upon said right-of-way, *including the tracks* of said Wabash Company between said points.'

The contract only related to 'right-of-way;' the prayer of the petition was for the use of 'right-of-way and tracks,' and the decree not only gives them the use of the 'right-of-way and tracks,' *but it subjects to the use of respondent the 'switches, side-tracks, turnouts, turntables and other terminal facilities,' and even goes so far as to require the Wabash Company to keep those additional properties in repair for respondent's use.*

Therefore, no matter what views may be taken of the case in other respects, the decree was erroneous in two particulars: *First*, because it is broader than the covenant; and, *Second*, because it is broader than the prayer of the bill. Both these objections are elementary."

In the report of the case (138 U. S. 1, 25) his argument is thus condensed:

"V. The Court erred in entering a decree broader than the contract.

The contract only related to right-of-way; the prayer of the petition was for the use of right-of-way and tracks, and the decree not only gives

them the use of the right-of-way and tracks, but it subjects to the use of the respondent the switches, side-tracks, turnouts, turntables and other *terminal facilities*, and even goes so far as to require the Wabash Company to keep those additional properties in repair for respondent's use. Therefore, no matter what view may be taken of the case in other respects, the decree was erroneous in two particulars: First, because it is broader than the covenant; and second, because it is broader than the prayer of the bill. Both these objections are elementary."

Mr. Justice Blatchford (id., 38) clearly understood the contention, as he thus stated it:

> "It is contended by the appellants that the Circuit Court erred * * * (5) in making a decree broader than the contract in that the County Company only agreed, at most, to permit other companies to use *its* right of way, while the decree gives the right to use the right of way, and tracks, side-tracks, switches, turnouts, turntables and *other terminal facilities of the Wabash Company.*

(7) If there is Any Such Thing as Res Adjudicata, it Exists Here.

In *Washington etc. Co.* v. *Sickles*, 24 How. 333, 343, 344, L. Ed., Mr. Justice Campbell said:

> "Experience has disclosed, that for the security of rights, and the preservation of the repose of society, a limit must be imposed upon the facilities for litigation. For this purpose, the presumption has been adopted, that the thing adjudged by a court of competent jurisdiction, under definite conditions, shall be received in evidence as irrefragable truth. This presumption is a guarantee of the future efficacy and binding operation of the judgment. It presupposes that all the constituents of the judg-

ment shall be preserved by the court which renders it in an authentic and unmistakable form. In the courts upon the continent of Europe, and in the courts of chancery and admiralty in the United States and Great Britain, where the function of adjudication is performed entire by a tribunal composed of one or more judges, this has been done without much difficulty. The separate functions of the judge and jury, in common-law courts, created a necessity for separating issues of law from issues of fact; and with the increase of commerce and civilization, transactions have become more complicated and numerous, and law and fact have become more closely interwoven, so as to render their separation more embarrassing. The ancient system of pleading, which was conducive to the end of ascertaining the material issue between the parties, and the preservation in a permanent form of the evidence of the adjudication, has been condemned as requiring unnecessary precision and subjecting parties to over-technical rules, prolixity, and expense. A system of general pleading has been extensively adopted in this country, which rendered the application of the principle contended for by the plaintiff impracticable, unless we were prepared to restrict within narrow bounds the authority of *res judicata*. It was consequently decided that it was not necessary, as between parties and privies, that the record should show that the question upon which the right of the plaintiff to recover, or the validity of the defense, depended for it to operate conclusively; but only that the same matter in controversy might have been litigated, and that extrinsic evidence would be admitted to prove that the particular question was material, and was in fact contested, and that it was referred to the decision of the jury."

In the leading case of *Cromwell* v. *Sac County*, 94 U. S. 351, 352, 353 L. Ed. Mr. Justice Field said:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as to an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

But where the second action between the same parties is upon a different claim or demand, the

judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

Tested by either rule, the *res adjudicata* exists. Every question that is now suggested not only *might* have been litigated, but was in fact actually presented and determined. The purchasing trustees under the foreclosure decree became parties appellant by substitution, and they in turn conveyed the property to the Wabash Western Railway Company, which consolidated into the present Wabash Company. The doctrine of *res adjudicata* applies to privies, for, as said in 1 Freeman on Judgments (4th Ed.), section 165:

"A person who purchases property, real or personal, is entitled to the benefits and subjected to the disadvantages which, by the operation of final adjudications, had attached to the property in the hands of its former owner."

At section 193:

"It is now a universally recognized rule of law that no alienation or transfer of the subject-matter of the controversy, made while the suit is being prosecuted with due diligence, need be noticed by the parties to the action. Such alienation, though valid between the parties thereto, is void

as against the judgment or decree finally rendered in the suit."

Upon the former appeal (138 U. S. 1, 35, 34 L. Ed. 843) the question was thus disposed of:

"In the present case, the tripartite agreement is a link in the chain of the title of the mortgagees and of the purchasing committee. The right-of-way through the park, granted by Griswold to the County Company November 3, 1871, was lost by non-user. The right-of-way granted by the Park Commissioners to the County Company under the first park act, of March 25, 1872, failed because that act was declared unconstitutional, in *Chouteau* v. *Leffingwell*, 54 Missouri, 458. The third line, that established by the tripartite agreement, was not identical with either of the two prior lines. The Park Commissioners, therefore, granted to the two companies, under the tripartite agreement, all the right-of-way which they acquired in the park. The right of the mortgagees and of the purchasing committee to use such right-of-way is based solely upon that agreement; and, holding under it, they must hold subject to its terms and conditions, irrespectively of the question of notice. *Whitney* v. *Union Railway*, 11 Gray 359; *Vandoren* v. *Robinson*, 16 N. J. Eq. 256; *Tulk* v. *Moxhay*, 2 Phillips 774; *Luker* v. *Dennis*, 7 Ch. D. 227; *Western* v. *Macdermott*, L. R. 2 Ch. 72. Therefore, the Wabash Company, the mortgagees, and the purchasing committee must be held to have had notice of the covenants and conditions of the tripartite agreement prior to the execution of the mortgage, and are bound by them, whether the covenants be or be not strictly such as run with the land."

IV.

REGARDLESS OF ANY TECHNICAL RULE AS TO RES ADJUDICATA, THE OPINION OF THE

SUPREME COURT AFFIRMING THE ORIGINAL DECREE IS THE LAW OF THIS CASE, WHICH THIS COURT CANNOT CHANGE OR MODIFY. ALL IT CAN DO IS ENFORCE THE THE DECREE.

The rule has often been stated when a second appeal or writ of error was taken in the same case.

In *Supervisor* v. *Kennicott*, 94 U. S. 498, 499, Mr. Chief Justice Waite said:

> "These questions are, therefore, no longer open; for it is settled in this Court, that whatever has been decided here upon one appeal cannot be re-examined in a subsequent appeal of the same suit."

In *Clark* v. *Keith*, 106 U. S. 464, 465, Mr. Chief Justice Waite said:

> "That question is no longer open in this case, for the reason that it has long been settled that whatever has been decided here on one writ of error cannot be re-examined on a subsequent writ brought in the same suit. This rule was distinctly stated in *Supervisors* v. *Kennicott*, 94 id. 498, where numerous authorities are cited, beginning as early as *Himely* v. *Rose*, 5 Cranch 313."

In *Thompson* v. *Maxwell etc. Co.*, 168 U. S. 451, s. c. 18 Sup. Ct. 111, 123, Mr. Justice Brewer said:

> "It is settled law of this Court, as of others, that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case. *Supervisors* v. *Kennicott*, 94 U. S. 498, and cases cited in opinion; *Clark* v. *Keith*, 106, U. S. 464, 1 Sup. Ct. 518; *Railroad Co.* v. *Ellis*,

144 U. S. 458, 12 Sup. Ct. 724; *Telegraph Co.* v. *Burnham*, 162 U. S. 339, 343. 16 Sup. Ct. 850."

This rule applies to the Circuit Court of Appeals hearing a second appeal of a case that had formerly gone to the Supreme Court.

In *People* v. *Ill. Cent. R. Co.* 91 Fed. Rep. 955, 957, s. c. 34 C. C. A. 138, Judge Jenkins said:

> "We are, however, not permitted to enter into the field of discussion of this most interesting question because, as we think, our duty is limited by the mandate of the Supreme Court to the consideration of the single question of fact whether the structures in question 'extend into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake." Nothing is open to consideration except the specific subject of inquiry reserved by the mandate of the ultimate tribunal. All else is final and conclusive between the parties. *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 16 Sup. Ct. 291."

Manifestly, if an appellate court upon review of a decision of this motion is bound arbitrarily by the former decision of the Supreme Court, the Chancellor hearing the same below was likewise bound, and so it has been repeatedly decided.

In re *Washington & Georgetown R. C.*, 140 U. S. 91, 97, a judgment for personal injuries was entered with no provision for interest. It was affirmed. Subsequently the lower court on motion allowed interest. The Supreme Court subsequently by mandamus enforced the original judgment without interest, Mr. Justice Blatchford saying, among other things:

"We do not consider the question as to whether interest was allowable by law, or rule, or statute, on the original judgment of the special term, or whether it would have been proper for the special term, in rendering the judgment, or otherwise, to have allowed interest upon it, or whether it would have been proper for the general term to do so, but we render our decision solely upon the point that, as neither the special term nor the general term allowed interest on the judgment, and as this Court awarded no interest in its judgment of affirmance, all that the general term could do, after the mandate of this Court went down, was to enter a judgment carrying out the mandate according to its terms, and simply affirming the prior judgment of the general term, and directing execution of the judgment of the special term of December 18, 1885, with costs and without interest, and of the judgment of the general term of June 28, 1886, for costs."

In *Gaines* v. *Rugg*, 148, U. S. 228, 238, 239, 240, 241, where a decree was only reversed on one point and Judge Caldwell attempted to retry the case, the Supreme Court compelled him by mandamus to execute the mandate, Mr. Justice Blatchford, among other things, saying:

"It is contended for the respondent that the construction of the intent and meaning of the opinion of this Court in *Goode* v. *Gaines* was a matter for the exercise of judicial discretion by the Circuit Court. But we are of opinion that it is proper for this Court, on this application for a writ of mandamus, to construe its own mandate in connection with its opinion; and if it finds that the Circuit Court has erred, or acted beyond its province, in construing the mandate and opinion, to correct the mistake now and here, and to do so

by a writ of mandamus. Obeying the mandate of this Court, and proceeding in conformity with its opinion, in the present case, were not matters within the discretion of the Circuit Court, and, therefore, the cases which hold that this Court will not direct in what manner the discretion of an inferior tribunal shall be exercised do not apply to the present case. . . . As the decree of the Circuit Court in regard to the title was not invalidated by the action of this Court on the appeal, the Circuit Court had no right to set aside that decree as respected the title nearly five years after it was rendered. The decree was beyond the control of the Circuit Court, unless on a bill of review duly filed, and the time for filing a bill of review had long ago elapsed. The Circuit Court could do nothing to affect the decree, except in obedience to the mandate of this Court *Chaires* v. *United States*, 3 How. 611, 620."

In re *Sanford Fork & Tool Co.*, 160 U. S. 247, 255, 256, Mr. Justice Gray said:

"When a case has been once decided by this Court on appeal and remanded to the Circuit Court, whatever was before this Court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. That Court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief, or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. *Sibbald* v. *United States*, 12 Pet. 488, 492; *Texas & Pacific Railway* v. *Anderson*, 149 U. S. 237. If the Circuit Court mistakes or misconstrues the decree of this Court, and does not

give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this Court. *Perkins* v. *Fourniquet* 14 How. 313, 330; *In re Washington & Georgetown Railroad*, 140 U. S. 91; *City Bank* v. *Hunter*, 152 U. S. 512; *City Bank, petitioner*, 153 U. S. 246."

In *Sibbald* v. *U. S.*, 12 Pet. 488, 492, Mr. Justice Baldwin said:

"When the Supreme Court have executed their power in a cause before them, and their final decree or judgment requires some further act to be done, it cannot issue an execution, but shall send a special mandate to the Court below to award it. 24 sect. Judiciary Act, 1 Story's Laws, 61. Whatever was before the Court, and is disposed of, is considered as finally settled. The inferior Court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matted decided on appeal for error apparent; or intermeddle with it, further than to settle so much as has been remanded. I S. C. 194, 197; I H. & M. 557; 3 Menif. 228. After a mandate, no rehearing will be granted. It is never done in the House of Lords; 3 Dow. P. C. 157; and on a subsequent appeal, nothing is brought up, but the proceeding subsequent to the mandate. 5 Cranch 316; 7 Wheat. 58, 59; 10 Wheat, 443."

It follows, therefore, that the mandate of affirmance from this Court was a direction to the Circuit Court to execute the original decree. It had no discretion in the premises.

V.

THE PREDECESSORS OF THE WABASH COMPANY HAVING HAD THE COURT ONCE FIX THE COMPENSATION TO BE PAID UPON THE BASIS OF THE EQUAL USE OF ALL THE PROPERTY, THAT COMPANY WILL NOT NOW BE PERMITTED TO OCCUPY THE INCONSISTENT POSITION OF CLAIMING THAT THE COLORADO COMPANY MUST MAKE ANY LESS USE OF ANY LESS PROPERTY; AND THIS REGARDLESS OF ANY TECHNICAL RULES OF RES ADJUDICATA LAW OF THE CASE, OR STRICT ESTOPPEL.

It has already been seen that at the insistence and upon the testimony of the officials of the Wabash Company the fixed charge for rental was established upon the theory that the Colorado Company obtained the equal use of *all* the property and its terminal facilities. Having assumed that position in court, at one time, there can be no change of front now, no matter if the former position was wrong, nor even if it was taken by mistake. No technical rule of estoppel need be invoked, as well settled principles of law determine the question.

In Bigelow on Estoppel (5th Ed.) 673, it is said:

> "A party cannot either in the course of litigation or in dealing *in pais* occupy inconsistent positions. Upon that rule election is founded; 'a man shall not be allowed,' in the language of the Scotch law, 'to approbate and reprobate.' "

In a note upon the same page the same author says:

"It may be doubted whether this subject properly belongs to the law of estoppel. Still, it has come to be so generally treated as a phase of estoppel that we have not felt at liberty to omit it. See *Strosser* v. *Fort Wayne*, 100 Ind. 443, 452. Indeed, it is perhaps well to bring together the scattered fragments of the law having a resemblance to election, and give them a common name. The right in all these cases, including that of election, is specific, and therefore so far like estoppel. Hence, the name 'election' not having met with favor beyond its old limits, we venture to name the whole group of cases 'Quasi-Estoppel.' "

At pages 689, 690, he says:

"A remarkable case, to be received with hesitation, may now be noticed. It has been laid down that persons who have procured the passage of an act of the Legislature, under which they have acted and obtained benefits, are estopped to show that the act was unconstitutional, though it may have been so pronounced by the courts concerning those who had not participated in its passage."

After giving many instances where persons will not be permitted to occupy inconsistent positions, the author (pp. 693, 694) concludes:

"Many of the cases upon this subject, it will be noticed, are simply cases of ratification or acquiescence; and it is a questionable use of terms, as we have seen, to apply the word 'estoppel' to them. * * * So far as the term 'estoppel' is used as a synonym in such cases with 'bar' or 'preclusion,' there is no great objection to its use; the objection to using it in cases of ratification and the like is that it is misleading. Ratification and acquiescence suppose the existence of something incomplete in regard to its legal consequences; hence

they cannot be a *kind* of estoppel in themselves. At most they are but facts which may serve to supply something otherwise wanting to an estoppel."

In 11 Amer. & Eng. Enc. of Law (2d Ed.), 446, 447, it is said:

> "Under the head of estoppel is often discussed also, though with questionable propriety, the doctrine of inconsistent positions whereby a person is precluded from taking, merely because his interests have changed, a position inconsistent with one previously assumed by him, and to the prejudice of a third person * * * It has been laid down as a general proposition, that where a party assumes a position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

The Federal Courts have been especially strict in enforcing this principle.

In *Philadelphia etc. R. Co.* v. *Howard*, 13 Howard 307, 337, Mr. Justice Curtis said:

> "We are clearly of opinion, that the defendant cannot be heard to say, that what was asserted on the former trial was false, even if the assertion was made by mistake. If it was a mistake, of which there is no evidence, it was one made by the defendant, of which he took the benefit, and the plaintiff the loss, and it is too late to correct it. It does not carry the estoppel beyond what is strictly equitable, to hold that the representation which defeated one action on a point of form, should sustain another on a like point."

In *Railway Company* v. *McCarthy*, 96 U. S. 258, 267, 268, Mr. Justice Swayne said:

> "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and a different consideration. He is not permitted thus to amend his hold. He is estopped from doing it by a settled principle of law."

In *Daniels* v. *Tearney*, 102 U. S. 415, 421, Mr. Justice Swayne said:

> "It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defence, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect."

In a recent case (*Davis* v. *Wakelee*, 156 U. S. 680, 689, 691) it was held that where in one case a party asserted that a judgment had been rendered against him he could not thereafter assert the invalidity thereof, although there was in fact no jurisdiction. The cases were thoroughly reviewed, Mr. Justice Brown, among other things, saying:

> "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary posi-

tion, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. * * * It is contrary to the first principles of justice that a man should obtain an advantage over his adversary by asserting and relying upon the validity of a judgment against himself, and in a subsequent proceeding upon such judgment claim that it was rendered without personal service upon him. Davis may possibly have been mistaken in his conclusion that the judgment was valid, but he is conclusively presumed to know the law, and cannot thus speculate upon his possible ignorance of it. He obtained an order which he could only have obtained upon the theory that the judgment was valid—his statement that it was in force was equivalent to a waiver of service, a consent that the judgment should be treated as binding for the purposes of the motion, and he is now estopped to take a different position."

In *Brooks* v. *Laurent*, 98 Fed. Rep. 647, 654, s. c. 39 C. C. A. 209, Judge Shelby said:

> "It is contrary to the first principles of justice that a party should be permitted to assert rights under a contract, and obtain advantages, or seek to obtain them, by litigation based on its validity, and in a subsequent proceeding relating to the same contract claim that it was without validity, and not binding on him. It seems well settled by principle and authority that a party to a suit is not permitted to take inconsistent positions to the detriment of his adversary on material questions involved in the litigation."

Applying these rules here we have this plain case: An increased rental was obtained from the Master because of the testimony of the General Manager of the Wabash Company and the position of its counsel that

the Colorado Company was obtaining the use of *all* the railroad property and terminal facilities. Thereafter, instead of paying a rental on the basis of the use actually made, the Wabash Company obtained from the Circuit Judge a ruling requiring the payment of the full one-half value of the *entire* use of *all* the property because the Colorado Company obtained the *equal* right to and benefits of *all* terminals.

So it is submitted that, irrespective of the questions of *res adjudicata* and law of the case, heretofore presented, the Wabash Company cannot occupy the inconsistent position of denying to the Colorado Company the equal use of all the property. The flagrant injustice of its being permitted so to do becomes the more apparent when it is suggested that for nineteen years it received large sums of money in rentals paid upon the faith of its former position and the decree which it obtained by virtue thereof. If there had been no decree the construction of the parties would have been conclusive. With a decree there should be an estoppel against a contrary construction.

VI.

THE DECREE IN THE MAIN CASE SHOULD NOT BE LIMITED BY CONSTRUCTION.

(a) While it is true (*Graham* v. *R. Co.*, 3 Wall. 704, 18 L. Ed. 247, 251) that where there is doubt as to the meaning of the decree, it will by construction be limited to the issues made by the pleadings, yet this rule has no application where there is no doubt as to the meaning of the decree. As said in *Weehawken Ferry Co.* v. *Sisson*, 17 N. J. Eq. 475, 481, 482):

"For some purposes, it is not doubted, the pleadings in a suit in equity are to be taken and examined in connection with the decree. It is certainly true, as it was insisted, that the rule of law requires the pleadings to be adduced, when the decree is brought into court as evidence. The reason of this rule is obvious. There are few decrees which do not, in some particulars, refer to the pleadings, either expressly, or by necessary implication. In such cases, where the decree refers to the pleadings, or to an intrinsic document, as containing a statement of facts necessary to the decree, and not embodied in it, such pleadings, or such document, as far as referred to, upon general principles, become part of the decree, for every purpose of construction. But in the case before us the decree, on the point in issue, made no allusion to the pleadings; it was complete and intelligible in itself; and the pleadings were to be ransacked to give it a meaning which its language, without such help, would not convey. I have examined with care the many cases on the printed brief of counsel, and I do not find one of them which countenances such a proposition. I do not find even a dictum which warrants the idea, that where a final decree has been made, which is complete in itself, and in which the language is intelligible, the bill or the answer can be read for the purpose of limiting the force of its words and controlling its legal effect."

(b) While the plea of *res adjudicata* is only good where the same issue is presented, yet the word "issue" does not necessarily mean that the pleadings in the original cause must present the precise question. If by motion, proofs, pleadings, or otherwise, the question was necessarily involved or was presented, controverted and decided, then it was in issue within the meaning of the rule.

Thus in 24 Am. & Eng. Enc. L., 766, it is said:

> "Hence it is not necessary to the conclusiveness of a former judgment that issues should have been taken upon the precise point controverted in the second action. Any conclusion which the court or jury must evidently have arrived at in order to reach the judgment or verdict rendered will be fully concluded."

Reynolds v. *Stockton*, 140 U. S. 254, 35 L. Ed. 464, 468, is a good illustration. Mr. Justice Brewer there announced the doctrine that where the defendant does not appear at the trial, the decree must be limited to the precise matter claimed in the bill, but where the party was present at the trial, actually litigating a matter not specifically put in issue by the pleadings, still the fact of the controversy made an issue within the meaning of the rule. He said:

> "In such a case, the proposition so often affirmed that that is to be considered as done which ought to have been done may have weight, and the amendment which ought to have been made to conform to the pleadings and the evidence may be treated as having been made."

This doctrine has been applied frequently. Thus, in *Newman* v. *Bullock*, 23 Col. 223, 47 Pac. 379, 381, an intervenor in a suit in which ownership of certificates of stock was in question, presented for determination without pleading, or objection, a question as to the validity of the certificate. The decision as to this was held to be *res adjudicata*, though the pleadings technically presented no such defense. The court, after citing *Reynolds* v. *Stockton*, 140 U. S. 254 said:

> "We may concede that the issue joined between the plaintiff Bullock and the defendants was over

the ownership of a certificate of stock, and that a new or different issue cannot be introduced in a cause by a petition of intervention, and that said new issue, if it was present at all in the case, was brought in by the mining company in its answer to the petition of intervention, filed by the bank, and that it was, in fact, an issue different from that in the main action. If a proper objection had been seasonably interposed, neither the intervenor nor the one answering to its petition of intervention could have been permitted to change the issue joined in the main action. *Van Gorden* v. *Ormsby,* 55 Iowa, 657, 8 N. W. 625; *Mayer* v. *Stahr,* 35 La. Ann. 57 17 Am. & Eng. Enc. Law, 646 et seq. But if such new issue is of such a nature that in a proper case it comes within the jurisdiction of the court, if no objection in the lower court is made by any of the parties concerned to its introduction into the case, no such objection can thereafter be made or raised upon a direct review of the judgment, much less upon a collateral attack by the very party who tendered the issue. *McKenty* v. *Gladwin,* 10 Cal. 227; *Smith* v. *Penny,* 44 Cal. 161; *People* v. *Reis,* 76 Cal. 269, 18 Pac. 309; *Sanxey v. Glass Co.,* 63 Iowa 707, 17 N. W. 429; 17 Am. & Eng. Enc. Law, 648."

In *Gates* v. *Newman,* 18 Ind. App. 398, 46 N. E. Rep. 654, 656, a similar distinction was made.

In *Oliphant* v. *Burns,* 146 N. Y. 238, 40 N. E. Rep. 980, 986, a decree for specific performance included land not specifically mentioned in the complaint, yet as the parties were present at the trial and took part in the proceedings, it was presumed that such land was inserted by the consent of the parties, and therefore the original decree was *res adjudicata,* the court, among other things, saying:

"We must presume, therefore, what we have no doubt is in accordance with the facts of the case, that the complaint was treated and regarded as though in purpose formally amended and the land so inserted in the judgment with the consent of the parties to the action."

In *Compton* v. *Jessup,* 15 C. C. A., 397, 68 Fed. Rep. 263, 295, 296, it was decided that the decree was *res adjudicata* where there was included in the decree part only of property upon which it was sought to subject a lien, parties being present at the trial. Judge Taft said:

"The prayer of Compton was for the enforcement of his lien by the sale of the whole railroad. If he asked for a sale of the whole property, the court had the right to enforce in his favor that remedy, or any remedy less than that which it thought just and proper. It was therefore within its jurisdiction, as invoked by Compton's prayer, to take as much of the property on which it declared the lien to exist as, in equity, it thought it had the right to take. It took that over which it had territorial jurisdiction. See opinion of court in 45 Ohio St. 592, 623, 16 N. E. 110, and 18 N. E. 380. Whether it erred in this, neither the court below nor this court is vested with the power to decide. It is true that the record does not show that any formal issue was made with reference to the amount of property to be sold to pay the lien, but this can make no difference. The court was bound, before it made an operative decree, to specify the property to be sold to pay the lien (*Railroad Co.* v. *Swasey,* 23 Wall. 405), and it was plainly within its power to subject less than that prayed for by the plaintiff to such a sale. The parties were present in court and might have objected to this form of remedy. Whether they did

> so, or not, the granting of the remedy, being within the prayer of Compton, was a binding and conclusive adjudication upon the parties in court that such a remedy was proper."

In *Jonathan Mills Mfg. Co.* v. *Whitehurst*, 19 C. C. A. 130, 72 Fed. Rep. 496, 503, the rule was by Judge Taft applied where the decree compelled the assignment of a specific patent not specifically mentioned in the bill.

(c) To determine whether any matter was in issue within the meaning of the law, it is, of course, necessary to consider the nature of the action, and as said in *Joy* v. *St. Louis*, 138 U. S. 1.

> "The prayer for injunction * * was a prayer for all that is necessary to secure, practically a specific performance of the agreement."

Hence, the action was in substance and in effect one in specific performance, and besides the prayer for specific relief, the original petition (Rec. 37), as well as the amendment (Rec. 160), asked for "such further relief in the premises as is consistent with equity and good conscience and as to this honorable court may seem meet." Under a general prayer, the rule is that any kind of relief can be given, consistent with the facts. (*Watts* v. *Waddle*, 6 Pet. 389; 8 L. Ed. 437; *Stevens* v. *Gladdy*, 17 Wall. 455, 15 L. Ed. 158; *Root* v. *R. Co.* 105 U. S. 194; 26 L. Ed. 177; *Wiggin's Ferry Co.* v. *O. & M. R. Co.* 142 U. S. 413, 35 L. Ed. 1062.)

In 20 Enc. Pl. & Pr., 511, 514, it is said:

> "Under a prayer for specific performance and general relief, the court may mould its decree according to the circumstances as they appear at the hearing. Where the special prayer which the plain-

tiff inserts is for a specific performance and a prayer for general relief is coupled with it, other relief may be granted under the general prayer, whether the special prayer is allowed or disallowed. Thus it has been held that under the prayer for general relief a decree for the payment of money may be granted and a lien secured by the contract may be declared enforced. So under the prayer for general relief, the court may, in its decree, protect the plaintiff against the dower interest of the defendant's wife. A decree rescinding the contract and awarding compensation to the complainant may be granted under the general prayer. A decree reforming the contract is improper as being inconsistent with the case set up in the bill, even though the bill contains a prayer for general relief in addition to the one for specific performance, where the bill contains no suggestion that there has been any mistake in making the contract. Where the bill prays for the reformation of the deed and also contains a prayer for general relief, specific performance may be granted under the general prayer although not prayed for specifically. In a suit for the specific performance of a contract of sale the vendor may, under the prayer for general relief, recover possession of the land sold."

Besides this, in specific performance, a decree can always be made upon condition, moulded to suit the equities and "modify the demands of parties according to justice." (*Willard* v. *Taylor*, 8 Wall. 557, 19 L. Ed. 501, 504; *McComas* v. *Easly*, 21 Grattan 31; *West Virginia Construction Co.* v. *Vinal*, 14 W. Va. 687).

As said in 20 Enc. Pl. & Pr. 478, 479:

"The court will mould its decree so as to fit the circumstances of each case. The general rule is that the parties must be placed in the same situa-

tion as if the contract had been performed according to its terms. But where specific performance of an agreement is impracticable, the plaintiff may have approximate relief in some other form which will secure to him the substantal advantages of his contract. The court is bound to see that it really does that complete justice at which it aims and which is the ground of its jurisdiction."

So, even where specific performance cannot be enforced because the contract is in parol, a decree may go to restoring the *status quo* (id. 493.), or where it is refused because of uncertainty, a return of the consideration may be required (id. 495.) So (id 496) it has been said:

> "A decree for specific performance should ordinarily enforce the whole contract,—the stipulations in favor of the defendant as well as those in favor of the plaintiff."

When a conveyance is compelled, a decree should require the plaintiff to make the payments required by the contract (id. 497), failing in which, the right to a specific performance may be barred (id. 498), or the property sold for purpose of raising the money (id. 499) with which to make the payments. So if a vendee is required to perform his contract, he may, at the same time, be awarded compensation for the injuries caused by the vendor (id. 499). So (id. 500, 502) it has been said:

> "Affirmative relief may be granted to a defendant as an incident to requiring the plaintiff himself to do equity. If a party appeals to a court of equity for the specific performance of a contract, he must himself do equity and submit to such terms as a court of equity will impose. The plaintiff must

consent to do what he would have been compelled to do if the other party had sought specific performance. Accordingly, whenever specific performance is decreed, the court may at the same time impose terms upon the plaintiff in order to make the decree equitable to all parties. Thus, where the plaintiff has delayed so long in filing his bill that it would be inequitable to permit him to demand an accounting of profits from the defendant, specific performance will be decreed only on terms that an accounting be denied. So the plaintiff may be charged with interest upon unpaid installments of purchase money. It is upon this principle that the plaintiff may be required to pay the purchase money even though the statute of limitations has run against the claim therefor."

This right to impose conditions, modify the demands of the parties according to justice, or mould the decree to suit the equities of the case, authorizes the court to grant the relief to the defendant without any necessity of pleading upon his part by way of cross bill. Thus, in 20 Enc. Pl. & Pr. 502, 503, it is said:

"According to the former practice, upon a bill for specific performance the court could decree in favor of the plaintiff only, leaving the defendant to obtain by a cross-bill that to which he was entitled. But according to the later practice the court may, if called on, dispense with a cross-bill and pass a decree upon the whole case, as well in favor of the defendant as of the plaintiff, as that one shall convey the property and the other pay the purchase money. The court may decree specific performance by both parties, without the filing of a cross-bill, where the agreement averred in the bill is admitted by the answer, or where the contract set up in the answer and proved is materially different from that alleged in the bill. The defendant may

> have a decree for the return of the earnest money paid without filing a cross-bill, where the title offered is bad and the return of the money is insisted upon in the answer."

(d) Another consideration frequently adverted to by the courts in dealing with the question whether an issue has been made is that any omission made in the original bill may be supplied, or aided by the averments in the answer. Thus, in *Newman* v. *Bullock*, 23 Col. 223, 47 Pac. Rep. 379, 381, a fact was brought in by answer that was not referred to in the petition, and it was held that this made an issue. The court held that the party who thus tendered the issue could not claim it was not an issue in the case. Many cases in the books illustrate the principle of thus creating an issue by an averment in the answer.

In *Price* v. *P. & F. H. Traction Co.*, 77 Mo. App. 236, 241, it was said that:

> **"If an omitted allegation be supplied by the pleadings of such adverse party, it is the same as if it were inserted in the party's own pleading."**

In *Hefferman* v. *Supreme Council*, 40 Mo. App. 605, is was said:

> **"Where the answer thus supplements the petition how can the defendant claim the proof offered should not be received, it being strictly within the issues framed by the pleadings?"**

In *Bliss on Code Pleadings*, Section 437, it is said:

> **"It was a rule of common law pleading that an omission to state a material fact, either in a declaration or special plea might be supplied by the pleadings of the opposite party. Mr. Chitty calls**

it 'express aider.'" See 1 Chitty Pl. (16th Am. Ed) 703.

So in *Pendel* v. *Trevor,* 30 Ark, 247, the answer set out contracts unknown to the plaintiff who was relying upon other equities, and it was held that the decree in favor of plaintiff could be based upon the answer.

In *U. S.* v. *Morris,* 10 Wheaton, 246, 6 L. Ed. 314, it is said that " any omission in the pleading of one party can be aided by the pleadings of the other."

In *McMahon* v. *Pope,* 10 S. D. 300, 73 N. W. Rep. 77, 78, it was said:

> "The rule has right reasoning for a basis, and is well recognized both at common law and under the code system, that the omission to state a fact, however essential, is cured when supplied by the pleading of the opposite party."

Here the Wabash Company injected into the case the fact that the County Company had no complete right of way between the park and 18th street, and that the Kansas City Company could not have its own right of way subjected to the use desired, the averment being (Rec. 173-174) that it

> "* * proceeded to acquire from the then owners thereof, at its own expense, by purchase or condemnation, a right of way through all the remaining and intermediate lots, in such manner as gave said company a continuous right of way sufficient for the construction and operation of its railroad from said north line of said park to Tayon avenue in said city."

So the answer (Rec. 175) averred that "the right of way and real estate outside of said park subsequently acquired by said * * Kansas City * * Company by pur-

chase and condemnation as aforesaid" was not bound by the contract.

VII.

THE WABASH COMPANY HAS AT ALL TIMES CONSTRUED THE RIGHT OF THE COLORADO COMPANY TO BE TO THE USE OF THE ENTIRE RAILROAD PROPERTY, REGARDLESS OF WIDTH, AND IS NOW ESTOPPED TO CLAIM TO THE CONTRARY.

The entry of a decree like that in the Main Case is illustrative of one of Mr. Justice Brewer's (*Chicago, etc., R. Co.* v. *U. P. R. Co.*, 47 Fed. Rep. 15 26) greatest statements:

> "* * * that the powers and processes of a court of equity are equal to any and every emergency. They are potent to protect the humblest individual from the oppression of the mightiest corporation; to protect every corporation from the destroying greed of the public; to stop state or nation from spoliating or destroying private rights; to grasp with strong hand every corporation, and compel it to perform its contracts of every nature, and do justice to every individual."

The character and nature of this decree is thus described in the opinion (Rec. 308-309; 29 Fed. Rep. 549-558) upon which it was based:

> "An act of the Legislature might be passed, giving to one company the right to use the tracks of another, and prescribing all the terms and conditions, the details for its use. I take it, an act of the Legislature would also be valid which simply declared that one company should have the right to use the tracks of another upon such terms and

conditions as the parties might agree upon, or should be prescribed by the courts; and if such a legislative act would have to be adjudged valid and complete, I see no satisfactory reason why courts may not also hold sufficient and valid a mere contract for the right, and determining the right, also settle and prescribe the terms of the use. It is true that such a decree cannot be executed by the performance of a single act, it is continuous in its operation; it requires the constant exercise of judgment and skill by the officers of the corporation defendant; and therefore in a qualified sense, it may be true, that the case never is ended, but remains a permanent case in the court, performance of whose decree may be the subject of repeated inquiry, by proceedings in the nature of contempt. It is also true, that in the changing conditions of business, the details of the use may require change. The time may come, when the respondent's business may demand the entire use of its tracks, and the intervenor's right wholly cease. But other decrees are subject to modification and change, as in decrees for alimony, the courts are not infrequently called to modify them by reason of the changed condition of the parties thereto. So, when a decree passes, in a case of this kind, it remains as a permanent determination of the respective rights of the parties, subject only to the further right of either party to apply for a modification, upon any changed condition of affairs; and, so far as any matter of supervision of the personal skill, and judgment of the officers of the respondent corporation, the contract in terms provides, that the regulation of the running of trains shall be subject to the control of the officers of the respondent. While I concede that there is force in the objection that this must remain, in a qualified sense, a continuing case in the courts, with the constant duty of supervising the acts of the respondent, yet

> it seems to me, that where there is a right, there must be a remedy, and that the mere machinery of court procedure is flexible enough to adapt itself to the necessities of protecting a right."

It is therefore manifest, that the very nature of the decree is such that action by the parties was as constantly required as it would have been under an executory contract. The decree, after all, was but evidence of the contract between the parties, and there is every reason to say that the action of the parties thereunder is as binding as if it had been a contract not evidenced by a decree; and it is manifest that the very nature of the decree is such that the action of the parties for years thereunder in exact accordance with their construction at the original trial must have great weight in determining its meaning. However, if, as the trial judge in this case said, the Wabash Company could not by any act upon its part change the meaning of it, yet it could so act as to estop itself from making the claim now set forth in limiting the words used therein. That it has so done will appear from the suggestions about to be made.

(a) All the property and terminal facilities between the north line of Forest Park and Eighteenth street were, at the instance of the Wabash Company, as heretofore seen, *valued as a railroad,* and the Colorado Company was required to pay as a fixed rental one-half of six per cent thereon, or twenty-five hundred dollars per month, together with its proportion of the taxes and maintenance upon a wheelage basis. (Decree, Rec. 293-295).

(b) Upon this valuation of *the whole property,* the fixed rental has been paid (Rec. 26-27, par. 13) by the

Colorado Company to the Wabash Company, which now claims the Colorado Company has only the right to a limited use of a part of the property.

(c) The Colorado Company during all these years paid upon a wheelage basis, as fixed in the decree, its proportion of the taxes upon the *whole* property (Rec. 25-26 par. 11).

(d) As to all the property except the tracks leading to private industries, as to which the matter was left open to proof, the parties stipulated (Rec. 26, par. 12) and one of the chief officers of the Wabash Company, Mr. Pryor, testified (Rec. 510-511, XQ. 10, 14-24), that during all these years the Colorado Company paid upon the wheelage basis, as fixed in the decree, its proportion of the cost of maintenance and repairs of all the property, including the Ewing avenue yards. So the petition in the Luke case showed (Rec. 440-475).

(e) As to the industrial tracks, *i. e.* the tracks leading to private industries, the parties failed to agree (Rec. 26-27, par. 12-14). These industrial tracks were (Rec. 27, par. 14) constructed under a form of contract (Rec. 313), by which the industry paid in full for the cost of everything excepting rails, switches, frogs, bolts and splices, and as to those the industry paid in in the form of six per cent interest upon the cost. The industrial tracks there at the time of the decree were ten in number, and of course included in the valuation upon which the fixed rental has been paid. Many records of the Wabash Company cannot be found (Evidence Tait, Rec. 528, XQ 1-2), so that it has been difficult to obtain a complete record, but everything appears to show that, although collecting the cost from the industry,

the Wabash Company has also collected the same upon the basis fixed in the decree, from the Colorado Company, thus recognizing that the latter had the right to the use thereof. It is at least fair to presume that whenever the industry did not pay the Colorado Company was charged or whenever the Wabash Company paid anything, the Colorado Company paid its part.

The side-tracks are shown by Exhibit D. (Rec. 27, par. 14) These are only mentioned because they were as between the parties treated just as were the industrial tracks thus showing how the parties viewed their rights. The side-tracks which were in the yards at the time the old decree was rendered, are shown by the testimony of A. S. Haynes, and by his Exhibit 2 (see Depositions and Second Partial Agreed Statement of Facts, Rec. 13-14). This exhibit gives the number of feet in each track, and adding all together, makes the total of 20,396 feet of side track in the yards, while the side-tracks now in the yards measure 23,265 feet, according to the scale upon Exhibit D, making 2,869 more feet of side-track now in the yards than there were at the time of the decree. An examination of Exhibit 2 of Haynes' testimony (Rec. 345) shows that there were at the time of the decree 17 side-tracks in the yards, consisting of 3 in Compton Avenue yards, 6 in Summit, or Ewing, Avenue yards, 7 in 22d Street yards and 1 cross-over track. An examination of Exhibit D shows that there are now in the yards 26 tracks, consisting of 11 in 22d Street yards, as against 7 at the time of the decree; 6 in Summit, or Ewing Avenue yards; 8 in Compton Avenue yards, as against 3 at the time of the decree, and 1 cross-over track, making in all now in the yards 9 more side-tracks

than there were at the time of the decree. The Wabash Company in five instances constructed new side-tracks in the yards (see Depositions and Second Partial Agreed Statement of Facts 352-358, par. 8, 9, 14, 15, 22.) In each of these instances the plural is used, so that in each instance at least two tracks must have been constructed, and as there were five instances, this makes not less than ten tracks in all. As there are but nine more tracks now in these yards than at the time of the decree, it is fair to assume that the Colorado Company assisted in the construction of all.

(f) An examination of Exhibit 2 of Haynes' testimony (Rec. 345) shows (see *infra* g) that there are now, as shown by Exhibit D, (Rec. 592) in existence 72 industrial tracks. Of these the Colorado Company contributed to the construction in instances where the contribution is shown (*infra* g) by the use of the name of the industrial track in thirty-six instances. The Colorado Company was charged with repair of eleven other tracks, where the name of the industrial track was used. In eight instances the Colorado Company was charged with the construction of side-tracks not shown to be in the yards, yet omitting the name of the industry to which the track led. The plural was used in each of these instances, so in the eight instances there must have been at least two tracks in each instance, making a total of 16 tracks. Thus, as shown, the Colorado Company has contributed to the construction or repair of 63 out of a possible total of 72 industrial tracks, many of which were included in the valuation fixed by the "Old Decree."

The contribution of the Colorado Company to the cost of the side-tracks is indicated by the testimony of

Haynes (Rec. 328-329), that all rail under seventy pounds went into the side and industrial tracks, which is shown by Exhibit 3 (Rec. 345-347) of his testimony. Many miles were charged to the Colorado Company. So there was other testimony offered that low switches and certain other material were charged, which alone went into side and industrial tracks (Deposition of B. F. Taylor, Rec. 320-326; A. S. Haynes, Rec. 328-333; Michael Hines, Rec. 333-336; Warner Decker, Rec. 336-338, Second Partial Agreed Statement of Facts, Rec. 347-360); but as to these last matters there is some dispute, and it is unnecessary to lay any special stress thereon.

(g) There is now tabulated a number of instances affirmatively shown by the record where contribution was made by the Colorado Company to the construction and maintenance of *industrial* tracks alone:

1. Ehlermann track:

This track was constructed prior to January, 1887, between 21st and 22nd Streets, and appears on plat, Exhibit D.

2. Collier track:

This track was constructed prior to January, 1887, between 22d and 23d Streets. (See Exhibit D.)

3. St. Louis Car Wheel Co. track:

(a) This track was constructed prior to January, 1887 (See said Exhibit D,) between Prospect and Spring Avenues.

(b) It was repaired in May, 1891. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company (Rec. 584), memorandum 5, of Tait's Exhibit "5."

4. Hydraulic Press Brick Co. track (1):

(a) This track was constructed prior to January, 1887. (See said Exhibit D), between Prospect and Spring Avenue.

(b) It was repaired in April, 1890. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company (Rec. 583), memo. 3, of Tait's Exhibit "5."

(c) It was also repaired in February, 1895, and the Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts (Rec. 355), subdivision 16.

5. Hydraulic Press Brick Co. track (2):

(a) This track was constructed prior to January 1, 1887, between Prospect and Spring Avenues. (Exhibit D.)

(b) This track was repaired in April, 1890. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company (Rec. 583), memo. 3 of Tait's Exhibit "5."

(c) It was also repaired in February, 1895, and the Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts (Rec. 355, subdivision 16.)

6. Hydraulic Press Brick Co. track (3):

(a) This track was constructed prior to January 1, 1887 (see said Exhibit D), between Prospect and Spring Avenues.

(b) This track was repaired in April, 1890. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company (Rec. 583) memo. 3 of Tait's Exhibit "5."

(c) It was also repaired in February, 1895, and the Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts (Rec. 255, subdivision 16.)

7. Hydraulic Press Company track (4):

(a) This track was constructed prior to January 1, 1887 (see Exhibit D), between Spring and Prospect Avenues.

(b) This track was repaired in April, 1890. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company (Rec. 583), memorandum 3 of Tait's Exhibit "5."

(c) It was also repaired in February, 1895, and the Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts (Rec. 355, subdivision 16).

8. Shovel Works track:

(a) This track was constructed prior to January 1, 1887 (see Exhibit D), between Manchester Avenue and Sarah Street.

(b) In June, 1891, this track was relaid and extended. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts (Rec. 350, subdivision 4),

9. Hoyt Metal Co. track:

(a) This track was constructed prior to January, 1887 (see Exhibit D), between Sarah Street and Boyle Avenue.

(b) It was extended in March, 1893. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts (Rec. 353, subdivision 10).

(c) It was extended again and repaired in August, 1893. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company (Rec. 584), memo. 7 of Tait's Exhibit "5."

10. Old Mike Foerstel track:

This track was constructed prior to January, 1887 (see Exhibit D), immediately east of Boyle Avenue.

11. Maguire Coal Co. track (1):

This track was constructed in January, 1889. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts (Rec. 348, subdivision 1); also depositions of Wabash Railroad Company (Rec. 582), subdivision 1 of Tait's Exhibit "4."

12. Maguire Coal Co. track (2):

This track was constructed in July, 1889. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts (Rec. 349, subdivision 2).

13. Reitz Cut track:

This track was constructed in October, 1895. The Colorado Company paid its proportion of the cost of the labor thereof. See Depositions of Wabash Railroad Company (Rec. 564).

15. Harrison-Berry Co. track:

(a) This track was constructed in November, 1896. The Colorado Company paid its proportion of the cost of the labor thereof. See Depositions of Wabash Railroad Company (Rec. 565), Tait's Exhibit "1."

(b) It was extended and connected with the Pacific Warehouse Co. track in November, 1896. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts (Rec. 356, subdivision 19); also Depositions of Wabash Railroad Company (Rec. 578), subdivision 13, Tait's Exhibit "4."

16. Heinrich Coal Co. tracks (9):

(a) These tracks were constructed at different times. The Colorado Company paid its proportion of

the cost thereof. See Depositions of Wabash Railroad Company (Rec. 82, 84, 90-91, 93, 96, 97).

(b) These tracks were relaid in January, 1901. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company (Rec. 586), Memo. 10 of Tait's Exhibit "5."

17. Gilsonite R. & P. Co. track:

This track was constructed in December, 1899. The Colorado Company paid its proportion of the cost of labor thereof. See Depositions of Wabash Railroad Company (Rec. 83). Tait's Exhibit "1."

18. Polar Wave Ice Co. track (1):

(a) This track was constructed in July-September, 1900. The Colorado Company paid its proportion of the cost of labor thereof. See Depositions of Wabash Railroad Company (Rec. 83, 84), Tait's Exhibit "1.", also p. 585 of said depositions, memo. 9 of Tait's Exhibit "5."

19. Polar Wave Ice Co. track (2):

This track was constructed in July-September, 1900. The Colorado Company paid its proportion of the cost of labor thereof. See Depositions of Wabash Railroad Company, pp. 567, 568 and 569, Tait's Exhibit "1;" also p. 585 of said depositions, memo. 9 of Tait's Exhibit "5."

20. Polar Wave Ice Co. track (3):

This track was constructed in July-September, 1900. The Colorado Company paid its proportion of the cost of labor thereof. See Depositions of Wabash Railroad Company, pp. 567, 568 and 569, Tait's Exhibit "1;" also p. 585 of said depositions, memo. 9 of Tait's Exhibit "5."

21. Polar Wave Ice Co. track (4):

This track was constructed in July-September, 1900. The Colorado Company paid its proportion of the cost of labor thereof. See Depositions of Wabash Railroad Company, pp. 567, 568 and 569,Tait's Exhibit "1;" also p. 585 of said depositions, memo. 9 of Tait's Exhibit "5."

22. Polar Wave Ice Co. track (5):

This track was constructed in July-September, 1900. The Colorado Company paid its proportion of the cost of labor thereof. See Depositions of Wabash Railroad Company, pp. 567, 568 and 569, Tait's Exhibit "1;" also p. 585 of said depositions, memo. 9, of Tait's Exhibit "5."

23. Empire Brewing Co. track:

This track was constructed in March, 1901. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company. p. 586, memo. 10 of Tait's Exhibit "5."

24. Lumber Co. track:

This track was constructed in May, 1889. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 582, memo. 1 of Tait's Exhibit "5."

25. M. C. P. & C. track (1):

(a) This track was extended and the grade thereof lowered in April, 1891. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 349, subdivision 3.

(b) It was repaired in May, 1891, and the Colorado Company paid its proportion of the cost thereof. See Deposition of Wabash Railroad Company, p. 584, memo. 5 of Tait's Exhibit "5."

(c) It was again extended in August, 1893, and the Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 584, subdivision 7 of Tait's Exhibit "5."

(d) This track was repaired in February, 1895, and the Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 355, subdivision 16.

26. Mound City P. & C. Co. track:

(a) This track was extended and the grade thereof lowered in April, 1891. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 349, subdivision 3.

(b) In February, 1895, it was repaired. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 355, subdivision 16.

27. Hay Exchange track (1):

(a) This track was extended and repaired in August, 1893. The Colorado Company paid its properton of the cost thereof. See Depositions of Wabash Railroad Company, p. 584, memo. of Tait's Exhibit "5."

(b) It was extended in November, 1896, and the Colorado Company paid its proportion of the cost thereof. See Depositions and second Partial Agreed Statement of Facts, p. 356, subdivision 19.

28. Hay Exchange track (2):

(a) This track was extended and repaired in August, 1893. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 584, memo. 7 of Tait's Exhibit "5."

(b) This track was extended in November, 1896. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 356, subdivision 19.

29. Hay Exchange track (3):

(a) This track was extended and repaired in August 1893. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 584, memo. 7 of Tait's Exhibit "5."

(b) This track was extended in November, 1896. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 356, subdivision 19.

30. Pacific Warehouse Co. track:

In November, 1896, this track was connected with the Harrison-Berry track. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 356, subdivision 19.

31. Donk Bros. Coal Co. track (1):

(a) This track was repaired in February, 1895. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 355, subdivision 16.

(b) In January, 1897, it was again repaired. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 357, subdivision 20.

(c) It was again repaired in June, 1901. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 586, memo. 12 of Tait's Exhibit "5."

32. Donk Bros. Coal Co. track (2):

(a) This track was repaired in February, 1895. The Colorado Company paid its proportion of the cost thereof. See subdivision 16 on p. 355 of Depositions and Second Partial Agreed Statement of Facts.

(b) In January 1897, it was again repaired. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 357, subdivision 20.

(c) It was again repaired in June, 1901. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 586, memo. 12 of Tait's Exhibit "5."

33. Donk Bros. Coal Co. track (3):

(a) This track was repaired in February, 1895. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 355, subdivision 16.

(b) In January, 1897, it was again repaired. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 357, subdivision 20.

(c) It was again repaired in June, 1901. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 586, memo. 12 of Tait's Exhibit "5."

34. Donk Bros. Coal Co. track (4):

(a) This track was repaired in February, 1895. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 355, subdivision 16.

(b) In January, 1897, it was again repaired. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 357, subdivision 20.

(c) It was again repaired in June, 1901. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 586, memo. 12 of Tait's Exhibit "5."

35. Donk Bros. Coal Co. track (5):

(a) This track was repaired in February, 1895. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 355, subdivision 16.

(b) In January, 1897, it was again repaired. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 357, subdivision 20.

(c) It was again repaired in June, 1901. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 586, memo. 12 of Tait's Exhibit "5."

36. Donk Bros. Coal Co. track (6):

(a) This track was repaired in February, 1895. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 355, subdivision 16.

(b) In January, 1897, it was again repaired. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 357, subdivision 20.

(c) It was again repaired in June, 1901. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 586, memo. 12 of Tait's Exhibit "5."

37. Logwood De Camp Co. track (1):

(a) This track was repaired in January, 1898. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, pp. 358-359, subdivision 23.

(b) It was again repaired in June, 1901. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 586, memo. 12 of Tait's Exhibit "5."

38. Logwood De Camp track (2):

(a) This track was repaired in January, 1898. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, pp. 358-359, subdivision 23.

(b) It was again repaired in June, 1901. The Colorado Company paid its proportion of the cost thereof.

See Depositions of Wabash Railroad Company, p. 586, memo. 12 of Tait's Exhibit "5."

39. Logwood De Camp track (3):

(a) This track was repaired in January, 1898. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, pp. 358-359, subdivision 23.

(b) It was again repaired in June, 1901. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 586, memo. 12 of Tait's Exhibit "5."

40. American Pressed Brick Co. track:

This track was repaired in September, 1898. The Colorado Company paid its proportion of the cost thereof. See Depositions and Second Partial Agreed Statement of Facts, p. 359, subdivision 24.

41. Tamm's Switch:

This track was repaired in May, 1891. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 584, memo. 5 of Tait's Exhibit "5."

42. Scruggs-McClure Co. track:

This track was extended in December, 1899. The Colorado Company paid its proportion of the cost thereof. See Depositions of Wabash Railroad Company, p. 580, subdivision 21 of Tait's Exhibit "4."

Some claim is made that material was not paid for. It was paid by the industry (Rec. 313). The accounts were so kept that it cannot be told what material was charged for (Rec. 347-433).

(h) Some confusion is created by a reference in the Record to the services charged for switching, which has no relation to the rental paid or the cost of maintaining the property. The Colorado Company had no switch engines or cars, and the Wabash Company did this work for it for hire (Rec. 27, par. 15.) Mr. Magee says (Rec. 514-515), and Mr. Emerson denies (Rec. 489-490), that this work was done under a verbal agreement, to be paid for in proportion to the number of cars switched, no matter whether the switching was done on the main, side or industrial tracks, which was different from the decree, where the wheelage was according to the wheels passed over the main track or parts thereof. While Mr. Magee says that the maintenance for the terminals was to be charged under this arrangement, this was contrary to the agreed statement of facts (Rec. 26, par. 12) and the way in which the accounts were kept. (Evidence Pryor, Auditor and Assistant to the President of the Wabash Company, Rec. 516-517).

The petitions and accounts set forth in the intervention of the Wabash Company in the receivership of the Colorado Company (Rec. 440-475) shows that the maintenance of the entire property was charged under the decree, on the ground (Rec. 445) that the Colorado Company had been continuously and jointly using with intervenor *"the right of way, tracks, side tracks, switches, turnouts, turntables, shops and other terminal facilities* as aforesaid, formerly owned by said Wabash, St. Louis & Pacific Railway Company, but now the property of intervenor."

Certain it is that the Wabash Compay never *paid* anything upon account of an industrial track that it

did not charge the Colorado Company its proportionate share.

Respectfully submitted.

W. F. EVANS,
M. A. LOW,
FRANK HAGERMAN.
Solicitors for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES

THE ST. LOUIS, KANSAS CITY AND COLORADO RAILROAD COMPANY.
Petitioner,

vs.

THE WABASH RAILROAD COMPANY AND THE CITY OF ST. LOUIS.
Respondents.

PETITION FOR CERTIORARI.

Now comes the St. Louis, Kansas City & Colorado Railroad Company, herein called the Colorado Company, and respectfully petitions this court to grant a writ of certiorari to the Circuit Court of Appeals for the Eighth Judicial Circuit, to remove therefrom, for review here, the record in the case therein pending, numbered 2788, wherein the petitioner is appellant and the Wabash Railroad Company and the City of St. Louis are appellees, a copy of the record being presented herewith, the sole question involved therein being whether under a decree, entered by Mr. Justice Brewer upon the Circuit (29 Fed. Rep., 546), and affirmed here

(138 U. S., 1), the Colorado Company is entitled to the use of certain tracks of the Wabash Company leading to private industries located in St. Louis, Mo.

Thereupon petitioner respectfully shows:

1. *Cause pending below and sought to be certified.*

(*a*) The petitioner as an intervenor in a cause pending below, there sought to enforce (Petition, Rec. 3-13) a decree (Rec. 4-7) in its favor entered by Mr. Justice, then Circuit Judge Brewer in the United States Circuit Court for the Eastern District of Missouri, December 31, 1886 (29 Fed. Rep., 546), afterwards affirmed here (*St. Louis* v. *Joy*, 138 U. S., 1), against the Wabash Railroad Company requiring the latter to accord to intervenor the equal use of its entire "right of way, tracks, side-tracks, switches, turnouts, turntables and other terminal facilities" in St. Louis between the north line of Forest Park and 18th street, the court having, upon the insistence of the Wabash Company, held that the compensation previously fixed by the master should be increased because the Colorado Company, by virtue of the decree, obtained the right to the use of *all* the terminals, including the industrial tracks in question.

(*b*) The answer (Petition Rec. 10.11, Par. 10. Answer Rec. 17, Par. 10) of the Wabash Company to this intervention was that while the Colorado Company could use all the property, it could make use of same only for through uninterrupted passage. After an extended trial (Rec. 23-592) a decree (Rec. 593, 594, 597) was entered upon this petition for enforcement denying the claim of the Wabash Company, but *limiting* the use of the intervenor under the decree to that part only of the right of way upon a strip 42 feet wide through Forest Park and 28 to 30 feet wide from the Park to 18th street, the opinion of the trial judge (144 Fed. Rep., 476) being that neither Mr. Justice Brewer, who entered the original decree, nor this court in affirming the same, intended their *general* language giving to intervenor the equal use

of the *entire* right of way and *all* terminal facilities, to apply to more than such narrow strip and *part* thereof.

(*c*) An appeal was then taken to the Circuit Court of Appeals for the Eighth Circuit, to which, in the absence of a jurisdictional or constitutional question the case had to go (*Mason* v. *Pewabic Mining Co.*, 153 U. S., 361, 38 L. Ed., 745) which reversed (Rec. 595) and remanded the case "with instructions to render a decree not inconsistent with the views" expressed in the opinion of Judge Sanborn (Rec. 601-621, 152 Fed. Rep., 849-856), that the intervenor was entitled to the equal use of the *entire* strip of land between the east line of the Park and 18th street *owned* by the Wabash Company and *all* terminal facilities thereon, but was "not entitled to the use * * * of any * * * industrial or railway facilities of the Wabash Company" *not on the strip so owned*, a limitation never before suggested by anyone. Judge Hook dissented (Rec. 620, 621, 152 Fed. Rep., 863) from this exception, but concurred in the rest of the opinion. This being a decree of reversal where private interests were involved and not one which was final, the case could not have *then* been brought here by certiorari (*C. & N. W. R. Co.* v. *Osborne*, 146 U. S., 354, 36 L. Ed., 1002; *Forsythe* v. *Hammond*, 166 U. S., 506, 574, 41 L. Ed., 1095, 1098; *Taylor* v. *Louisville, etc., R. Co.*, 172 U. S., 648, 43 L. Ed., 1182) nor by appeal (*MacLeod* v. *Graven*, 79 Fed. Rep., 84; *Lubin* v. *Edison*, 195 U. S., 624, 49 L. Ed., 349) so intervenor was remediless until a new decree was entered.

(*d*) When the mandate (Rec. 593, 595) reached the Circuit Court, intervenor by leave of court and *consent* of parties (Rec. 597) filed an amendment to its petition setting up the action aforesaid, the mandate of the Circuit Court of Appeals and averring that neither the Circuit Court of Appeals nor the Circuit Court had any right to exclude it from the use of the industrial tracks of the Wabash Company beyond the limits of the land owned by it, and to enter a decree so doing would fail to give full faith and credit to

one entered by Mr. Justice Brewer and the mandate of affirmance from this court, all contrary to sections 1 and 2 of article III, and article VI, of the Constitution of the United States, it having been said in *Embry* v. *Palmer,* 107 U. S., 9, 27 L. Ed., 346, 349, that these sections required to be accorded to a decree of a federal court the same full faith that must be given under section 1, article IV, to one of the state courts.

(*e*) The Circuit Court then entered a new decree (Rec. 625, 626) giving intervenor the use of all the property upon the land *owned* by the Wabash Company between Forest Park and 18th street, but excluded it from the use of its industrial tracks between said points on land not so owned, holding that if the industrial tracks were between such points and owned and used by the Wabash Company, yet not located upon land owned by the company, they were not then within the benefit of the decree. From this decree an appeal (Rec. 626) was taken to the Circuit Court of Appeals, where a motion has been filed by appellee to dismiss it because, it being a second appeal to the same court, the former opinion is the law of the case and the merits cannot there be inquired into (*Stewart* v. *Salamon,* 97 U. S., 361). However, upon an application here for a writ of certiorari the rule of *Stewart* v. *Salamon* has been expressly held to have no application (*Panama* v. *Napier Shipping Co.,* 166 U. S., 280, 41 L. Ed., 1004, 1005). Instead of this being a reason for refusing to grant the writ, it is one for granting it; otherwise the first decision of the Circuit Court of Appeals having been one of reversal, the case could not have been brought from that court here by certiorari, appeal or any other means, and an application of the rule of *Stewart* v. *Salamon* would create a situation where this court could not construe its own decree, though practically nullified by a decision of an inferior court.

(*f*) An appeal was also taken directly to this court (No. 253 October term, 1908) upon the ground that full faith and credit had not been given to its decree as required by sections 1 and 2, of article III, of the Constitution. There being doubt as

to which appeal should be prosecuted, this court being the one which should finally decide the case, the safe course to adopt is to follow the practice pursued in *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S., 138, 43 L. Ed., 108, 111, 112, and now granting this petition, hear both appeals at the same time.

2. *Reasons for granting this petition.*

(*a*) Vast property interests are involved. The right of a great railroad to reach the enormous private industries in the center of a great city is a matter of the utmost concern. Moreover, here there was an absolute failure by the Circuit Court to recognize and it refused to carry out the express mandate of this court (138 U. S., 1), affirming the decree of Mr. Justice Brewer, and directing (Rec. 25) it "to carry out" same.

(*b*) The master, to whom the cause was originally referred, fixed the full compensation to be paid for the use of the property at six per cent interest upon a valuation of $1,000,000, to be divided between the two roads upon a wheelage basis (Rec. 144, 145). Exceptions were filed by the Wabash Company to this part of the report (Exceptions XI and XII, Rec. 232, 233) and sustained by Mr. Justice Brewer (29 Fed., 546, 559, Rec. 310, 311), who rejected the division made by the master on a wheelage basis and charged the intervenor with the full value of the full half of the use because it obtained an equal right with the Wabash Company of the entire right of way, *including the access to the various private industries along the line*, and equal competition upon equal terms for their business. Upon appeal here by the Wabash Company it was contended (138 U. S., 25, 29, Rec. 29) that the Circuit Court erred in decreeing that a contract giving the use of the *right of way* was sufficient to give the right among other things to use these side-tracks, switches and other terminal facilities. This court denied the contention, saying that as the lower court adopted its theory as to the compensation upon the insistence of the Wabash

Company, the latter could not complain. Ever since December 31, 1886, the Colorado Company has paid (Rec. 26) the rental thus fixed, and up to May 7, 1902 (Petition, Rec. 10, Answer, Rec. 15), no question was ever raised as to its having the equal right to the use of all the terminal facilities, including the industrial tracks; never before the suggestion by the Circuit Court of Appeals was there a pretense that the industrial tracks could not be used. It would, therefore, seem that it is not only the right, but the duty of this court to see to it that a party cannot for over fifteen years use its decree to its own advantage and then at will reject all its burdens.

(*c*) The industrial tracks from the use of which appellant is now excluded are owned by the Wabash Company. They lead from its main track upon the strip of land owned by it to private industries in the vicinity. They were constructed upon the lands of the industries under contracts (Rec. 27, 313) between the latter and the Wabash Company, by which the industries furnished the land and paid the cost of construction, except the materials upon the value of which they paid six per cent annual interest. The value of these industrial tracks so owned by the Wabash Company, though located upon the lands of others, was included in the valuation, interest upon which was fixed as the rental to be paid by the Colorado Company. In most, if not all instances, the Colorado Company was charged with had paid its proportion under the decree, of the cost of maintaining these tracks, and when any such new tracks were put in the Wabash in addition to collecting from the private industry, collected from the Colorado Company its proportion upon the wheelage basis. It was after more than fifteen years' use under the decree that the claim was made of any limitation in the right of intervenor. So for this reason also, it would seem that it is not only the right, but the duty of this court to see for itself that one of the litigants cannot abuse the terms of its own decree. No other court can so intelligently decide what the decree

means; surely upon such a question the decision of no lower court should be final.

(*d*) A brief in support hereof is attached hereto, reference to which is made as fully as if incorporated herein.

W. F. EVANS,
M. A. LOW,
FRANK HAGERMAN,
Solicitors for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

The petition below, rather than mandamus here, was the proper method for the enforcement of the decree of December 31, 1886.

(*a*) The decree (Rec. 4-7) sought to be enforced was that of the Circuit Court, which had been affirmed here (138 U. S., 1), the parties stipulating (Rec. 25, paragraph 10) that this court "* * * issued its mandate of affirmance to the lower court *directing it to carry out its decree.*" It is, therefore, the decree of this court which is sought to be enforced.

(*b*) The enforcement of a decree of this court can be through original proceedings in mandamus instituted and carried on here. Where, however, there is likely to be an issue of fact presented, as was the case here, the approved method is to present the application to the Circuit Court by petition or motion and then take the case up by appeal (*Perkins* v. *Fourniquet,* 14 How., 328, 330, 14 L. Ed., 441, 442; *In re Washington, etc., R. Co.,* 140 U. S., 91, 95, 96, 35 L. Ed., 339, 341; *City National Bank* v. *Hunter,* 152 U. S., 512, 38 L. Ed., 534).

Indeed, in such case, this court in the exercise of a wise discretion, could decline to entertain mandamus and require the parties to first present their complaint to the lower court.

II.

Such a proceeding made necessary an appeal first to the Circuit Court of Appeals, though the decree sought to be enforced was the decree of this court.

After the rendition of the decree sought to be enforced, and before the filing of the petition to enforce it, the Circuit Court of Appeals was established, so that in the absence of a constitutional or jurisdictional question, the case had to be appealed to that court, (*Mason* v. *Pewabic Mining Co.,* 153 U. S., 361, 38 L. Ed., 745), whose judgment in case of a final decree would, for the purpose of review here, have been final and only reviewable by certiorari. This because no constitutional question having been raised, the jurisdiction as to intervenor was to be determined by that of the main cause, which jurisdiction had been invoked because of diverse citizenship (*Gregory* v. *Van,* 160 U. S., 643, 40 L. Ed., 566; *Carey* v. *R. Co.,* 161 U. S., 115, 40 L. Ed., 638; *Rouse* v. *Hornsby,* 161 U. S., 583, 40 L. Ed., 817; *Pope* v. *L. & N. R. Co.,* 173 U. S., 173, 43 L. Ed., 814). Hence the strange situation arose of that court being the final appellate tribunal to finally determine what the decree of this court meant. So when the Circuit Court decreed (144 Fed. Rep., 476, Rec. 598, 599) that the rights of the Colorado Company were limited to that part of the Wabash right of way located upon a 30-foot strip, the appeal was taken to the Circuit Court of Appeals, which unanimously reversed that decree and remanded the cause for further proceedings, but by a divided court held (majority opinion of Judge Sanborn, Rec. 601, 620, 152 Fed. Rep., 849-863; minority opinion by Judge Hook, Rec. 620, 621, 152 Fed., 863, 864) that there could be no use of the industrial tracks owned but not located upon land owned by the Wabash Company, a limitation never thought of or suggested by anyone before.

III.

There was no method by which the decree of the Circuit Court of Appeals could be reviewed.

The majority opinion (Rec. 601, 619-620, 152 Fed. Rep., 849, 863) said:

"The conclusion is that the Colorado Company is entitled to enjoy the joint and equal use of the entire strip of land between the east line of the park and 18th street which the Wabash owned or had acquired the right to use when the decree of 1886 was rendered, and of the tracks, side-tracks, turn-outs, turntables and terminal facilities now thereon. But it is not entitled to the use under that decree of any of the property, industrial or railway facilities of the Wabash Company beyond the limits of that strip. *Union Pacific R. Co.* v. *Mason City & Ft. Dodge R. Co.*, 199 U. S., 171, 26 Sup. Ct. 19, 50 L. Ed., 134.

The question whether or not equity demands the decree in this case to be conditioned by the requirement that the Colorado Company shall henceforth pay, in addition to the amount specified in the decree of 1886, 6 per cent per annum upon one-half of the cost or value of the improvements which the Wabash Company has placed upon this right of way since 1886 or by any other requirement and questions pertinent to an accounting between the parties have not been considered, because there is no cross-appeal, and this decision does not foreclose the consideration and determination of these issues, if any, by the court below previous to the entry of its decree. *Guarantee Co.* v. *Phenix Ins. Co.*, 59 C. C. A., 376, 124 Fed., 170.

The decree below is reversed, and the case is remanded to the Circuit Court with instructions to render a decree not inconsistent with the views expressed in this opinion."

This, then, being a decree of reversal, was not final, so that this court would not *then* take jurisdiction by certiorari, the controversy being between private parties (*C. & N. W. R. Co.* v. *Osborne*, 146 U. S., 354, 36 L. Ed., 1002; *Forsythe* v. *Hammond*, 166 U. S., 506-574, 41 L. Ed., 1095, 1098; *Taylor* v. *Louisville, etc., R. Co.*, 172 U. S., 648, 43 L. Ed., 1182), and for the same reasons had the cause been otherwise appealable here this court would not have entertained jurisdiction (*MacLeod* v. *Graven*, 79 Fed. Rep., 84; *Lubin* v. *Edison*, 195 U. S., 624, 49 L. Ed., 349).

IV.

The decision of the Circuit Court of Appeals brought into the case a constitutional question.

Inasmuch as the Circuit Court of Appeals for the *first* time,

without any claim of the Wabash Company to that effect, decided that the intervenors were not entitled to the use of the industrial tracks and remanded the cause for a new trial upon that theory, intervenors decided to file an amendment and invoke jurisdiction upon the ground that to enter such a decree they were deprived of a constitutional right. So by leave of court and consent of parties (Rec. 597) this order was made:

"By consent of parties it is ordered that said intervenor have leave to file its amendment to its intervening petition as this day presented, which is accordingly done."

The amendment was duly filed (Rec. 597-600) and contained a history of the proceedings, averring that to enter, as decided upon its own suggestion by the Circuit Court of Appeals, a decree excluding intervenors from the use of the industrial tracks would not give full faith and credit to a decree of this court, as required by the provisions of the Constitution (Art. III, Secs. 1 and 2; Art. VI). It is true that section 1, article IV, provides that "full faith and credit shall be given in each *state* to the public acts, records and judicial proceedings of every other *state*." This technically only relates to the proceedings of the state courts, yet coupled with others, regarding the extent of the judicial power of the United States, it is not stretching the spirit of that instrument if it requires one federal court to give full faith to proceedings in another. So in *Embry* v. *Palmer*, 107 U. S., 9, 27 L. Ed., 346, 348, 349, Mr. Justice Matthews said:

"So far as this statutory provision relates to the effect to be given to the judicial proceedings of the state, it is founded on Article IV, Section 1, of the Constitution, which, however, does not extend to the other cases covered by the statute. The power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the Constitution, such as those which declare the extent of the judicial power of the United States, which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the Government of the United States, or in any department or officer thereof, and which declare the supremacy of the authority of the National Government within the limits of the Con-

stitution. As part of its general authority, the power to give effect to the judgments of its courts is co-extensive with its territorial jurisdiction. That the Supreme Court of the District of Columbia is a court of the United States, results from the right which the Constitution has given to Congress of exclusive legislation over the district. Accordingly, the judgments of the courts of the United States have invariably been recognized as upon the same footing, so far as concerns the obligation created by them, with domestic judgments of the states, wherever rendered and wherever sought to be enforced. * * *"

If, as section 1 of article III of the Constitution provides, all federal courts but this are *inferior* it is manifest that no system of laws can exist which will permit an inferior court by construction to impair the effect of a decree here rendered, or deprive a party of the right to have *this* court finally say what its decree means. So whether attempted to be done by legislation or judicial decision, the Constitution will not permit to become final, a construction of an inferior court of a decree of the Supreme Court, As said by Mr. Justice Brewer (*Leadville Coal Co.* v. *McCreery,* 141 U. S., 475, 35 L. Ed., 824, 825, 826):

"It would be an anomaly in legal proceedings if, after a court with full jurisdiction over property in its possession has finally determined all rights to that property, subsequent proceedings in a court of another jurisdiction could annul such decree, and disturb all rights once definitely determined."

V.

Decree entered upon mandate from the Circuit Court of Appeals and appeals therefrom.

The Circuit Court entered the decree (Rec. 625, 626) in conformity with the opinion of the Circuit Court of Appeals. By excluding intervenor from the use of the industrial tracks full faith and credit was denied to a decree of this court. Doubtful as to the forum to which the case should be appealed, two appeals were taken, one to the Circuit Court of Appeals, which is now sought

to be removed by certiorari, and the other directly to this court, where it was filed January 17, 1908, and was regularly docketed as No. 253 at the October, 1908, term. The record is printed in both cases and is exactly the same. This course was pursued in *Burton* v. *U. S.*, 196 U. S., 283, 49 L. Ed., 482, and *Pierce* v. *Creecy*, 208 U. S., 616, 210 U. S., 387, so that this court would be in position to take jurisdiction either by certiorari or by direct appeal. In Burton's case the petition for certiorari was taken under advisement with the case here upon its merits and then denied. In Pierce's case it was denied because the writ of error to this court was clearly well taken. In *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S., 138, 43 L. Ed., 108, 111, 112, the petition was granted and both appeals heard at the same time. This because of doubt as to which appeal should be sustained.

VI.

The controversy as to whether an appeal lies here directly from the Circuit Court.

(*a*) Of course, if an appeal lies directly from the Circuit Court to this court, then there would be no necessity of one to the Circuit Court of Appeals, nor for this application. It might be an answer to this application to say that an appeal could be taken directly. If so, this court should say it in plain terms so that the question of jurisdiction would be forever settled. *Burton* v. *U. S.*, 196, 283, 49 L. Ed., 482, 486, presented a similar dilemma, so writs of error were sued out to the two courts. This court solved the problem by continuing the application for certiorari and hearing it with the argument of the case under direct review.

(*b*) Doubt as to the right of a direct appeal here arises because of the claim of the Wabash Company that no constitutional question arose in the case. If the failure of the lower court to give full faith and credit to the decree of this court was violative

of the Constitution, then a constitutional question has arisen which brings the whole case here for review, for if the question "be not frivolous" there is jurisdiction, as was decided in *Burton* v. *U. S.*, 196 U. S., 283, 49 L. Ed., 482, 485. Under the dicision in *Embry* v. *Palmer*, 107 U. S., 9, 27 L. Ed., 346, 348, 349, the question is not believed to be frivolous. Anyhow, this court should either by certiorari or direct appeal decide for itself the meaning of its own decree, for as said (*Leadville Coal Co.* v. *McCreery*, 141 U. S., 475, 35 L. Ed., 824, 825, 826) by Mr. Justice Brewer:

"It would be an anomaly in legal proceedings if, after a court with full jurisdiction over property in its possession has finally determined all rights to that property, subsequent proceedings in a court of another jurisdiction could annul such decree, and disturb all rights once definitely determined."

VII.

The motion of the Wabash Company in the Circuit Court of Appeals to dismiss the appeal renders necessary this application.

(*a*) The Wabash Company has filed in the Circuit Court of Appeals a motion to dismiss the last appeal because the former opinion is the law of the case, citing and relying upon *Stewart* v. *Salamon*, 97 U. S., 361, 24 L. Ed., 1044; *Humphrey* v. *Baker*, 103 U. S., 736; 26 L. Ed., 456; *Mackall* v. *Richards*, 116 U. S., 45, 29 L. Ed., 558; *U. S.* v. *New York Indians*, 173 U. S., 464, 43 L. Ed., 769, and *Southern B. & L. Assn.* v. *Carey*, 117 Fed. Rep., 325. The question thus presented to that court is in view of these decisions, no light one, for in *Stewart* v. *Salamon*, 97 U. S., 361, 24 L. Ed., 1044, 1045, Mr. Chief Justice Waite said:

"An appeal will not be entertained by this court from a decree entered in the circuit or other inferior court, in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is, in effect, our decree, and the appeal would be from ourselves to ourselves. If such an appeal is taken, however, we will,

upon the application of the appellee, examine the decree entered, and if it conforms to the mandate, dismiss the case with costs. If it does not, the case will be remanded with appropriate directions for the correction of the error. * * *"

(*b*) This doctrine, if sustained, and the case held not subject to review, would present an anomalous situation. The first decision of the Circuit Court of Appeals was not reviewable here because the decree being one of reversal, was not final. If the second decision must follow the first, that being the law of the case, the result is there can be no review upon appeal of the decree last entered. Thus an *inferior* court could finally decide the effect of a decree here rendered. Fortunately this court solved this problem in *Panama* v. *Napier Shipping Co.*, 166 U. S., 280, 41 L. Ed., 1004, 1005. Upon the first appeal from the decree (42 Fed. Rep., 922) the Circuit Court of Appeals reversed and remanded the cause (1 C. C. A., 576, 50 Fed. Rep., 557). Upon second appeal (9 C. C. A., 553, 61 Fed Rep., 408) there was an affirmance. Certiorari was then, after the second appeal, granted and the case reversed, this court holding that it was then in a position to review the whole case from its inception, and that the first decision of the case was not the law of the case. Mr. Justice Brown said:

"But while the Court of Appeals may have been limited on the second appeal to questions arising upon the amount of damages, no such limitation applies to this court when in the exercise of its supervisory jurisdiction it issues a writ of certiorari to bring up the whole record. Upon such writ the entire case is before us for examination."

It is, therefore, submitted that the simple solution of the matter is to remove the case here by certiorari.

Pullman's Palace Car Co. v. *Central Transportation Co.*, 171 U. S., 138, 43 L. Ed., 108, 111, 112, is express authority for the course sought to be pursued here. The facts were by the court thus stated:

"From this judgment the Pullman Company appealed directly to this court. It also appealed to the Circuit Court of Appeals. The case was there argued upon a motion to dismiss the appeal,

and the motion denied, and the further argument was postponed until some disposition was made of the appeal taken directly to this court. 39 U. S. App., 307. A motion has also been made to this court to dismiss the appeal, and thereupon an application was made to us for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit, and on account of the peculiar circumstances it was granted, and the record has been returned to this court by virtue of that writ."

Mr. Justice Peckham said:

"Counsel for the Pullman Company took the appeal directly from the Circuit Court to this court upon the theory that the case involved the construction or application of the Constitution of the United States, because of the holding of the court below that the cause of action alleged by the Central Company in its cross-bill was under the circumstances a proper subject of equitable cognizance, and counsel claimed it was really nothing but a legal cause of action in regard to which the cross defendant was entitled to a trial by jury under the Constitution of the United States. There being room for doubt in regard to the soundness of such contention, the counsel also took an appeal to the Circuit Court of Appeals, and we think that by this action he did waive any right of appeal which he would otherwise have had. Whichever route may be the correct one, either directly from the Circuit Court or through the Circuit Court of Appeals, it is unnecessary to decide, because the case is now properly before us either by appeal or by the writ of certiorari; and we therefore proceed to determine it upon the merits."

VIII.

Case upon the merits.

1. *The duty of this court.*

We briefly consider the merits of the case, so that one may see at a glance that the right asserted is not unfounded, and that having for sixteen years paid the rent required by the decree good faith requires that intervenor should now enjoy its benefits. No inferior court can finally deprive it of a right accorded by a decree here. As Mr. Justice Brewer, in *Leadville Coal Co.* v. *McCreery*, 141 U. S., 475, 35 L. Ed., 824, 825, 826, said:

"It would be an anomaly in legal proceedings if, after a court

with full jurisdiction over property in its possession has finally determined all rights to that property, subsequent proceedings in a court of another jurisdiction could annul such decree and disturb the rights once definitely fixed."

2. *The language of the original decree covers the industrial tracks.*

So far as general language could give it, the original decree (Rec. 4, 5) covers all the property of the Wabash Company between certain points by this describing it:

"The right of way and tracks, side-tracks, switches, turn-outs, turntables and other terminal facilities of said Wabash, St. Louis & Pacific Company at and between the north line of Forest Park and Eighteenth street in the city of St. Louis."

Unless, therefore, there is some strong reason for so doing, there cannot be excluded from this sweeping language the industrial tracks owned by the Wabash Company, although located upon land owned by the industries.

The opinion of Judge Sanborn in the Circuit Court of Appeals (Rec. 606, 152 Fed. Rep., 849, 852) exhaustively discussed this question in dealing with that part of the decree of the Circuit Court (144 Fed. Rep., 476) which limited the intervenor's use to a 30-foot strip of the right of way. He, among other things, said:

"To one ignorant of the origin and history of the rights of the contending parties and unaware of the persuasive arguments of counsel, the reading of this decree would suggest no doubt that it granted the joint use of the entire strip owned by the Wabash Company and of all the railroad facilities thereon between the east line of the park and Eighteenth street. Upon its face there is no ambiguity in its terms. They suggest no limitation or exception, and, when the terms of a decree are plain and clear, their ordinary meaning and effect may not be lawfully contracted or extended, unless it appears with reasonable certainty that such was the purpose of the court; for the legal presumption is that the judge carefully and thoughtfully expressed therein his deliberate intention. The Wabash Company, therefore, assumed no light burden when it essayed to prove that the court intended by this decree to grant to the Colorado Company the joint use of a strip only 30 feet in width out of the wider strip the Wabash Company owned between the east line of the park and Eighteenth street."

3. *Diverse views in the Circuit Court of Appeals.*

When, however, Judge Sanborn reached the close of his opinion (152 Fed. Rep., 863, Rec. 619) in excluding intervenor from the use of the industrial tracks, he simply said:

"The conclusion is that the Colorado Company is entitled to enjoy the joint and equal use of the entire strip of land between the east line of the park and Eighteenth street which the Wabash owned or had acquired the right to use when the decree of 1886 was rendered, and of the tracks, side-tracks, turn-outs, turntables, and terminal facilities now thereon. But it is not entitled to the use under that decree of any of the property, industrial, or railway facilities of the Wabash Company beyond the limits of that strip. *Union Pacific R. Co.* v. *Mason City & Ft. Dodge R. Co.*, 199 U. S., 171, 26 Sup. Ct., 19, 50 L. Ed., 134."

No reason was given for this restriction other than that the learned judge regarded as controlling the decision of this court in *U. P. R. Co.* v. *Mason City & Ft. Dodge R. Co.*, 199 U. S., 160, 50 L. Ed., 134.

Judge Hook, in dissenting from this view (152 Fed. Rep., 863, 864, Rec. 620, 621) not only pointedly showed the error thereof, but also that the case relied upon had no bearing whatsoever upon the question. His language was:

"I concur in the reversal of the decree of the trial court, and also for the most part in what is said in the foregoing opinion. I do not, however, concur in the exclusion of the industrial tracks from the operation of the decree of 1886. These tracks are the usual and necessary features of railway terminals in a large city, and are as much a part thereof as the limbs are of a tree. They go with the right of way as appendages thereto, and are always so regarded. Their use is essential to the enjoyment of the rights awarded. In my opinion they are clearly within the spirit of the decree of 1886, and also by fair construction within its letter. The decree granted to the intervenor the 'right of way, tracks, switches, side-tracks, turn-outs, turntables, and other terminal facilities of the Wabash Railway Company between the north line of Forest Park and Eighteenth Street in the city of St. Louis.' This is very broad language and it was repeatedly employed in the decree. That Judge Brewer intended to include such industrial tracks as were in existence when the decree was made also seems plain from his opinion (29 Fed., 559). The cost of their construction was in-

cluded in the total cost upon which the percentage compensation to be paid by the intervenor was based. Moreover, the consistent course of conduct of the parties for 13 years following the decree shows that they regarded them as being a part of the property the joint use of which was granted to the intervenor. I am unable to see any persuasive reason for excepting them from the comprehensive enumeration of terminal facilities in the decree. That they extend beyond the side lines of the strip of land owned by the Wabash Company and upon the land of others seems to me to be a circumstance wholly immaterial, and yet it must be the circumstance upon which their exclusion from the decree is made to depend. The Wabash Company owns these industrial tracks and operates them as part of its right of way and terminal facilities. Of what importance is it that they are in part upon public highways and the land of others under license instead of being wholly upon land owned by that company? If the latter condition existed, it would doubtless be conceded that they fell within the decree. The scope of the decree is, therefore, determined not by the character of the tracks and their relation to the right of way and terminal facilities as a whole with which the court was dealing but by the character of the title of the Wabash Company to the ground upon which the tracks are laid. It seems to me there has been a narrowing of the decree in this particular.

The case of the *Union Pacific Company* v. *Mason City Company*, 199 U. S., 160, 171, 26 Sup. Ct., 19, 50, L. Ed., 134, is not an authority for this construction of the decree. The court was there considering a claim of the Mason City Company for the use of the Union Pacific bridge across the Missouri River at Omaha, and its approaches. Naturally this would not include industrial tracks and switches. Indeed, when rightly regarded, the decision of the Supreme Court makes for a conclusion contrary to that reached by my associates. An act of Congress conferring in the most general terms upon other railroad companies the right to cross the bridge at Omaha was held to give the Mason City Company the right not only to cross the bridge, but to use several miles of main and passing tracks of the Union Pacific in the cities of Omaha and South Omaha. The decision well serves to illustrate the liberality with which provisions of the kind we are now discussing are construed when public interests are involved. Of course, the right to use industrial tracks laid since the decree of 1886 was rendered would require consideration of the subject of compensation. The compensation specified in the decree does not include them.

There are also some other observations near the close of the foregoing opinion which I think are not necessary to the con-

sideration of the case. They relate to conditions which it is conceded do not exist at present and which may never arise in the future. I do not wish to express or concur in any view concerning them until they arise and are presented for judgment in the usual way."

4. *By the original decree an increased compensation was required of the Colorado Company because it obtained the use of the industrial tracks.*

The master's report reviewed the evidence (Rec., pp. 140-145) and finally concluded (Rec., 144, 145) thus:

"Endeavoring to extract from the contradictory views and testimony on these points some basis which may be equitable, I think it would be proper to adopt as a basis the present value of the property sought to be used, to allow interest on this sum at the legal rate of interest in the State of Missouri, to-wit, six per cent to add to this the actual expenses of repairs and maintenance of the right of way and tracks, and the operating expenses of these tracks, and to divide the whole on a wheelage basis, charging each road in proportion to the number of cars and locomotives run over the tracks by each, the Wabash road to keep an accurate account of such maintenance and operating expenses, and each road to keep an accurate account of the number of cars and locomotives run over said tracks by each, and settlement to be made every thirty days between the companies. For the purpose of ascertaining the amount of interest to be paid, I think, from all the testimony, that a fair valuation of the right of way and tracks sought to be and necessary to be used, should be fixed at $1,000,000.00."

In his report the master referred to testimony of the officers of the Wabash Company that the valuation to be fixed should include "the real estate and tracks and side-tracks laid thereon and other appurtenances necessary for doing business," and "that the reason the whole property should be taken in the value is that you cannot do business without the siding, switches, etc., for the purpose of storing, loading and unloading the cars."

The case was again referred for further testimony and the master the second time reported (Rec. 224):

"On the final hearing additional evidence was offered as to the proper measure of compensation and also as to the value of

the real estate occupied by the railroad from the north line of Forest Park to Eighteenth street. The testimony as to the value of the real estate does not include the superstructure or terminal facilities occupied by the Wabash, which the testimony of Mr. Talmage shows would be necessarily used if the intervenor had the right to use the Wabash tracks.

After due consideration of this new testimony, I am inclined to think that my original valuation of the track and right of way sought to be used, was equitable and proper under the circumstances."

To this report the Wabash Company filed exceptions (Exceptions XI and XII, Rec., 232, 233), the main complaint of which was that "the master erred in refusing to find that the measure of compensation and mode of ascertaining the same suggested by defendants and supported by the testimony of Mr. How, Mr. Talmage and other witnesses, is proper, equitable and just." That method, as already seen, was taking the railroad as a whole between the two points in question.

With these exceptions before him, Mr. Justice Brewer (Rec., 310, 29 Fed. Rep., 546, 559) said:

"The final matter is that of compensation. In this I think the Master erred. He fixed the value of the right of way at a million of dollars, and reported that, in his judgment, the share of the interest on this value and in the expenses of keeping up the track, which the intervenor company should pay, should be fixed upon a wheelage basis. So far as respects the mere matter of keeping up the track, I see no reason to doubt the justice of the rule fixed by the Master; but, in regard to the interest on the value, I think the intervenor should pay one-half of that, and for these reasons: It is a familiar fact, that in a large city like St. Louis, along the track of an important railroad, within the city limits, are built large manufacturing establishments, warehouses and other buildings for the convenient transaction of business between the carrier on one hand, the manufacturer and the merchant on the other. Another road coming over the same track not only uses the property, of great value, which the company owner has in the first instance paid for, but also shares in the benefit of access to all these manufactories, warehouses, etc. It thus places itself in competition with the original company for this valuable business. Such competition may operate to diminish the business of the original company, or compel it to lower its rates to preserve the business. In either way

it operates to the serious detriment of the original company. The new company comes in as an equal competitor. It shares in all the benefits of its business, and it may share equally. Under those circumstances, it seems to me no more than fair that a new company, which crowds itself into an equal access to such benefits and such privileges, should pay an equal share of the interest on the value of the property. Hence, I shall sustain the objections of the respondent to the report of the Master, so far as concerns the amount of compensation, and I think that the intervenor company must pay one-half the interest on the value and its share of the cost of keeping up the track, determined upon a wheelage basis. In other respects the report of the Master will be confirmed."

The decree then entered (Rec., 292, 296) so fixed the compensation.

In the Supreme Court it was (Rec., 29) by the Wabash Company contended:

"The contract only related to 'right of way;' the prayer of the petition was for the use of the 'right of way and tracks,' and the decree not only gives them the use of the 'right of way and tracks' but it subjects to the use of respondent the 'switches, sidetracks, turn-outs, turn-tables and other terminal facilities,' and even goes so far as to require the Wabash Company to keep those additional properties in repair for respondent's use."

In the report of the case (138 U. S., 1, 47, 48, 34 L. Ed., 843, 848) this argument is set forth though in somewhat condensed form. This court finally (138 U. S., 1, 47, 48, 34 L. Ed., 843, 858) said:

"The Circuit Court having adopted the rate of compensation insisted upon by the appellants, and the Colorado Company not having taken an appeal, the question of the rate of compensation is concluded between the parties."

It is perfectly clear, therefore, that the original decree intended to give the use of all the terminal facilities, including these industrial tracks. The testimony reported by the master (Rec. 140-145) clearly shows that Col. Talmage, then general manager of the Wabash Company, and Col. How, general agent of the receivers, based their valuation on the railroad as a whole, including the appurtenances and terminal facilities. At one place Mr. Talmage

(Rec. 224) is reported to have said that the valuation must be made of "the necessary terminals that must be used here in order to bring these trains in and prepare them to go out."

5. *The Wabash Company has always treated the industrial tracks as part of the property for the use of which the Colorado Company paid, and is now estopped to claim that they cannot be used.*

It is manifest that the very nature of the original decree was such that action by the parties was as constantly required as it would have been under an executory contract. The decree was but evidence of the contract between the parties, and it is manifest that its very nature is such that the action of the parties for years thereunder must have great weight in determining its meaning. While it is true that the Wabash Company could not by any act upon its part change its meaning, yet it could so act as to estop itself from making the claim now set forth in limiting the general words used therein. That up to the time of filing the intervening petition, all parties had acted upon the theory that there was a right to use the industrial tracks is plain from the suggestions now about to be made.

(*a*) All the property between the north line of Forest Park and Eighteenth Street was, at the request of the Wabash Company, by the report of the master (Rec. 140-145) valued as a railroad, and the Colorado Company was required to pay as a fixed rental one-half of 6 per cent thereon, or $2,500 a month, together with its proportion of the taxes and maintenance upon a wheelage basis (Decree, Rec., 292, 296). This fixed rental was for one-half of the use, while if it had been divided as the master originally reported, it would have been very much less (Rec., 433-439).

(*b*) Upon this valuation of the whole property the fixed rental has always been paid (Rec. 26, paragraph 13) by the

Colorado Company to the Wabash Company, which now claims that the decree gave no right to the use of the industrial tracks.

(*c*) The Colorado Company, during all these years, paid upon a wheelage basis as fixed in the decree its proportion of the taxes upon the whole property (Rec. 25, 26, paragraph 11), including the industrial tracks.

(*d*) As to all the property except the industrial tracks, as to which the matter was left open for proof, the parties stipulated (Rec. 26, paragraph 12) that the Colorado Company paid its proportion of the cost and maintenance of all the property under the terms of the decree.

(*e*) As to the tracks leading to private industries, the parties failed to agree (Rec. 26, 27, paragraph 14), leaving the matter open for proof.

(*f*) On account of many of the books and papers of the Wabash Company having been burned (Ev. Tait, Rec. 528, X-Q. 1, 2) it was an impossibility to obtain a complete statement as to the Colorado Company's contribution to the maintenance and construction of the industrial tracks. However, it clearly appears that there were constant and repeated instances of repairs made to the industrial tracks prior to 1887, for which the Colorado Company paid its proportion upon the terms of the original decree. This was true as to the various and numerous tracks leading to the industries of the St. Louis Car Wheel Co. (Memo. 5, Tait's Ex. 5, Rec. 584); Hydraulic Press Brick Co. (Memo. 3, 5, Tait's Ex. 5, Rec. 583, 2nd Agreed Statement, par. 16, Rec. 355); Shovel Works (2nd Agreed Statement, par. 4, Rec. 350); Hoyt Metal Co. (2nd Agreed Statement, par. 10, Rec. 353, Memo. 7, Tait's Ex. 5, Rec. 584).

Likewise it clearly appears that there were constant and repeated instances where the cost of construction, repairs and maintenance upon industrial tracks constructed after January 1, 1887, for which the Colorado Company paid its proportion upon the terms

of the original decree. This was true as to the tracks leading to the industries of the Maguire Coal Co. (2nd Agreed Statement, par. 1, 2, Rec. 348, 349, Memo. 1, Tait's Ex. 4, Rec. 573); Reitz Cut Track (Tait's Ex. 1, Rec. 564); Harrison-Berry Co. (Tait's Ex. 1, Rec. 563, Memo. 13, Tait's Ex. 4, Rec. 578, 2nd Agreed Statement, par. 19, Rec. 356); Heinrich Coal Co., (Tait's Ex. 1, Rec. 566, 569, Tait's Ex. 4, Rec. 579, 582, Memo. 10, Tait's Ex. 5, Rec. 586); Gilsonite R. & P. Co. (Tait's Ex. 1, Rec. 567); Polar Wave Ice Co. (Tait's Ex. 1, Rec. 567, 568, 569, Memo. 9, Tait's Ex. 5, Rec. 585); Empire Brewing Co. (Memo. 10, Tait's Ex. 5, Rec. 586); Lumber Co. (Memo. 1, Tait's Ex. 5, Rec. 582); M. C. P. & C. (2nd Agreed Statement, par. 3, 16, Rec. 349, 355, Memo. 5, 7, Tait's Ex. 5, Rec. 584); Mound City P. & C. Co (2nd Agreed Statement, par. 3, 16, Rec. 349, 355); Hay Exchange (Memo. 7, Tait's Ex. 5, Rec. 584, 2nd Agreed Statement, par. 19, Rec. 356); Pacific Warehouse Co. (2nd Agreed Statement, par. 19, Rec. 356); Donk Bros. Coal Co. (2nd Agreed Statement, par. 16, 20, Rec. 355, 357, Memo. 12, Tait's Ex. 5, Rec. 586); Logwood De Camp Co. (2nd Agreed Statement, par. 23, Rec. 358, Memo. 12, Tait's Ex. 5, Rec. 586); American Pressed Brick Co. (2nd Agreed Statement, par. 24, Rec. 359); Tamm's Switch (Memo. 5, Tait's Ex. 5, Rec. 584), and Scruggs-McClure Coal Co. (Memo. 21, Tait's Ex. 4, Rec. 580).

Respectfully submitted,

W. F. EVANS,
M. A. LOW,
FRANK HAGERMAN,
Solicitors for Petitioners.

Received copy of foregoing petition for certiorari and brief in support thereof, and acknowledge receipt of notice that the same will be presented at the opening of court on November 16, 1908, or as soon thereafter as same can be heard.

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Solicitors for Wabash Railroad Company.

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Solicitors for the City of St. Louis.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

ST. LOUIS, KANSAS CITY & COLORADO RAILROAD COMPANY,
Petitioner,

CITY OF ST. LOUIS AND THE WABASH RAILROAD COMPANY,
Respondents.

No. 301.

BRIEF OF RESPONDENT, WABASH RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR CERTIORARI.

WELLS H. BLODGETT,
JAMES L. MINNIS,
Solicitors for Respondent,
Wabash Railroad Company.

St. Louis Law Printing Co., 311-315 Lucas. Bell, Main 1919

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

ST. LOUIS, KANSAS CITY & COLORADO RAILROAD COMPANY,

Petitioner,

CITY OF ST. LOUIS AND THE WABASH RAILROAD COMPANY,

Respondents.

STATEMENT.

(1) On August 11th, 1875, the predecessor in title of the Wabash, St. Louis & Pacific Railway Company, (hereinafter called the Pacific Company), having located its railroad in the City of St. Louis from Union Station, westward about three miles to the east line of Forest Park, and purchased detached portions of a number of lots or blocks of ground for a right-of-way, acquired by contract a right-of-way forty-two feet wide over a part of Forest Park (from the east line northwesterly to the north line) on condition that it would

"permit under such reasonable regulations and terms as may be agreed upon, other railroads to use its right-of-way through the park and up to the terminus of its road in the City of St. Louis, upon such terms and for such fair and equitable compensation to be paid to it therefor as may be agreed upon by such companies". This condition will hereafter be called the covenant and the terminus of the road will be referred to as Union Station. The right-of-way (between the east line of the park and Union Station) mentioned in the covenant was described in the contract as "a strip of ground twenty-eight or thirty feet wide". Additional ground was afterwards purchased which, with the detached parcels previously acquired, made a continuous strip from the east line of the park to Union Station. In some instances the company found it could purchase entire blocks or lots for about the sum asked for a narrow strip or right-of-way across them. and on this account the strip was of irregular width, but in the main twenty-eight or thirty feet wide. The Pacific Company constructed its main line and side or passing tracks on the strip twenty-eight or thirty feet wide mentioned in the covenant. It constructed a turn-table and some side tracks on adjacent land purchased in acquiring that strip.

(2) On May 29th, 1884, the jurisdiction of the Circuit Court was invoked in the case styled "Central Trust Company of New York *et al.* v. Wabash, St. Louis & Pacific Railway Company *et al.*", on the ground of diverse citizenship, and for the purposes of foreclosing the mortgages on the property and franchises of the Pacific Company, including the property above mentioned. Receivers were appointed who took charge of and operated the property, as is usual in such cases.

(3) On July 12th, 1886, the St. Louis, Kansas City & Colorado Railroad Company, (hereinafter called the Colorado Company), having constructed a railroad about twenty miles in length from Creve Coeur Lake eastward to a connection with the railroad of the Pacific Company at a point where it intersects the north line of Forest Park, demanded of the receivers permission to run its cars over the tracks on the right-of-way through the park and east of the park to Union Station, under and on the terms prescribed by the covenant. This demand was denied and thereupon the Colorado Company and the City of St. Louis filed a bill of intervention in the foreclosure suit, praying the Court to require by injunction the Pacific Company and its receivers to specifically perform the covenant in behalf of the Colorado Company. Issue was joined, the case referred and exceptions taken to the Master's report, and the cause submitted for decision. On December 31st, 1886, the Court rendered its decree, authorizing and permitting the Colorado Company "with its right-of-way, road, tracks, and property, engines and cars, loaded or empty, to make connection with" the Pacific Company "at the north line of said Forest Park and to use the said right-of-way tracks, switches, side tracks, turntables, turn-outs, and other terminal facilities of" the Pacific Company "between the north line of said park and 18th street on the terms, in the manner, and subject to the regulations in this decree set forth". The decree required the Colorado Company to pay as compensation six per cent on one-half of the value of the property to be used which, was fixed at one million dollars ($1,000,000). (See report of case, 29 Federal Reporter, 546; p. 296 *et seq.*, Transcript; see decree, p. 292 *et seq.*, Transcript.)

(4) From this decree the Pacific Company and its receivers appealed to this Court, where the decree was affirmed (see Joy v. St. Louis, 138 U. S. 1).

Thereupon the Colorado Company entered upon and continued to use the tracks and facilities above mentioned in dispatching its trains to and from Union Station.

(5) Following the construction of the railroad, an industrial district was built up in the territory between the east line of the park and Union Station. Some few industries were located along the main track, the greater number, however, being located some distance north and south of the main line.

The Wabash Railroad Company (herein called the Wabash Company) successor in title to the Pacific Company, **after** the decree was affirmed, constructed some eighty odd tracks to industries located some distance from the main line as a means of inducing patronage. The Colorado Company did not at any time prior to the filing of its second intervention hereafter mentioned, claim under the decree the right to use these industrial tracks with its engines and cars. The cars of the Colorado Company destined to and from these industries were handled by Wabash engines under an agreement between the operating officials of the two companies (p. 515, Transcript). The Wabash Company also constructed yards for storing and switching cars in connection with the operation of its lines west and east of the Mississippi River on ground between Union Station and the east line of the park acquired **after** the rendition of the decree.

(6) On the 17th day of October, 1902, the Colorado Company, having completed its line to Kansas City,

Missouri, filed in the foreclosure suit a second intervening bill, praying that the Wabash Company be required under the decree of December 31, 1886, to permit the Colorado Company to use for the purposes of its railroad, in addition to the property it was then and had been using, all the yards, industrial tracks and other facilities of the Wabash Company located between the east line of Forest Park and Union Station (p. 3 *et seq.*, Transcript). Issue was joined, testimony taken, and the cause came on for final hearing.

The Wabash Company contended: First, that the language "said right-of-way, tracks, switches, sidetracks, turn-outs, and other terminal facilities" of the Pacific Company "between the north line of said park and 18th street" was employed in the decree of December 31st, 1886, to designate the right-of-way through the park and the strip twenty-eight or thirty feet wide (bound by the covenant) between the east line of the park and Union Station, and the facilities thereon. Second, that the use decreed the Colorado Company comprehended only the dispatching of its trains to and from Union Station. Third, that the decree did not, in any event, entitle the Colorado Company to use any of the property, industrial or railway facilities, of the Wabash Company beyond the limits of the irregular strip of ground purchased by the Pacific Company in connection with acquiring its right-of-way between the east line of the Park and Union Station.

(7) On April 2nd, 1906, the case having been submitted, the Circuit Court handed down its decision sustaining the first and third contentions of the Wabash Company and denying the second, and entered its de-

cree interpreting the decree of December 31st, 1886, accordingly. (See 144 Federal Reporter, 476; also p. 593 *et seq.*, Transcript.)

From this decree the Colorado Company appealed to the Circuit Court of Appeals for the Eighth Circuit. On April 3rd, 1907, the Circuit Court of Appeals handed down its opinion by Judge Sanborn, Judge Hook dissenting. The majority opinion sustained the Court below in denying the second contention of the Wabash Company and then denied the first contention of that company on the ground that the language of the bill of intervention and the decree thereon December 31st, 1886, were sufficiently comprehensive to include the entire strip of ground owned by the Pacific Company between the east line of the park and Union Station at the time that decree was rendered, and the tracks and facilities thereon, but sustained the third contention of the Wabash Company that the decree of 1886 did not entitle the Colorado Company to use the industrial tracks and other facilities of the Wabash Company beyond the limits of that strip (see 152 Federal Reports, 849; page 603, *et seq.*, Transcript), and on June 5th, 1907, sent down its mandate reversing the decree of the Circuit Court and remanding the cause "with directions to enter a decree not inconsistent with the views expressed in the opinion of this court".

"The views expressed in the opinion" with respect to the scope the decree should cover were stated in the following language:

> "The conclusion is that the Colorado Company is entitled to enjoy the joint and equal use of the entire strip of land between the east line of the park and Eighteenth street which the Wabash owned or had acquired the right to use when the

decree of 1886 was rendered, and of the tracks, side tracks, turnouts, turntables and terminal facilities now thereon. But it is not entitled to the use under that decree of any of the property, industrial or railway facilities of the Wabash Company beyond the limits of that strip." (Page 619, Transcript.)

(The Pacific Company and its successor were referred to as the Wabash Company throughout the opinion.)

(8) On December 18th, 1907, the Colorado Company filed in the Circuit Court, presided over at the time by Judge Dyer (who did not preside in the trial of the cause), what is designated as "an amendment to the petition of the St. Louis, Kansas City & Colorado Railroad Company" (p. 597 *et seq.*, Transcript). This paper contains four paragraphs. The first and second paragraphs give a history of the litigation up to that time. We will quote the concluding sentence of the second paragraph: "The Court (Circuit Court of Appeals) in that opinion (Judge Sanborn's opinion) among other things held that under the decree of December 31st, 1886, set forth in the original petition, petitioner was entitled to enjoy the joint and equal use of the entire strip of land between the north line of Forest Park and 18th street in St. Louis, Missouri, which the Wabash, St. Louis & Pacific Railroad Company owned or had acquired the right to use when said decree was rendered, and all tracks, sidetracks, turn-outs, turn-tables, and terminal facilities now thereon, but was not entitled to the use under that decree of any of the property, industrial or railroad facilities of the Wabash Railroad Company beyond the limits of that strip." The remaining paragraphs are as follows:

"3. Petitioner is entitled to all the relief for which it prayed in its original petition, and neither the Circuit Court of Appeals nor this Court has any right to exclude it from the use and benefit under the decree of December 31st, 1886, of the property, industrial or railroad facilities of the Wabash Railroad Company beyond the limits of the strip mentioned, and any such construction of said original decree fails to give full faith and credit thereto, to which petitioner is entitled under and by virtue of the following provisions of the Constitution of the United States: Section 8, Article 1, Sections 1 and 2 of Article III; Section 1 of Article V and Article VI."

"4. Petitioner therefore shows that this case arises under the Constitution of the United States, and it hereby invokes the jurisdiction of this Court for the protection to which it is thereunder entitled, and asks that under said constitutional provisions full faith and credit be given to said decree of December 31st, 1886, and that it be accorded all the relief for which it originally prayed, including the right under said decree to the equal use and benefit of the property industrial or railroad facilities, from which said opinion of the Circuit Court of Appeals attempts to exclude it, and petitioner will ever pray, etc."

(9) On December 20th, 1907, the Circuit Court notwithstanding the so-called "amendment to the petition" rendered a decree in exact accordance with the mandate which, omitting formal parts, is as follows:

> The decree of December 31st, 1886, set out in the intervenor's application and motion is in full force and effect and is binding upon the St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns, and upon the defendant Wabash Railroad Company, its successors and assigns. The said Wabash Railroad Company, its officers, agents and employes are hereby enjoined to forthwith ac-

cord to the St. Louis, Kansas City and Colorado Railroad Company, its successors and assigns, upon the terms fixed in said decree, the enjoyment of the joint and equal use of the entire strip of land between the east line of Forest Park and Eighteenth street in St. Louis, Missouri, which the predecessor of the Wabash Railroad Company owned or had acquired the right to use when the said decree of December 31st, 1886, was rendered, and of the tracks, side tracks, turnouts, turntables and terminal facilities now thereon, but is not entitled to the use under that decree of any of the property industrial, or railway facilities of the Wabash Railroad Company beyond the limits of that strip, and said Wabash Railroad Company, its officers, agents and employes, are enjoined from refusing to permit such use under the terms of said decree by said St. Louis, Kansas City & Colorado Railroad Company, its successors and assigns (page 625 Transcript).

On the same day the Colorado Company filed its assignment of errors and petitions for an appeal to this Court and also to the Circuit Court of Appeals for the Eighth Circuit, and the appeals were allowed. The assignment of errors complained that the Circuit Court "erred in each of the following rulings:

"1. In rendering the decree of December 20th, 1907, for that the same was contrary to the law and contrary to the evidence in the case.

2. In rendering and entering that portion of said decree providing, 'But it is not entitled to the use, under that decree, of any of the property, industrial or railway facilities of the Wabash Railroad Company, beyond the limits of that strip.'

3. In rendering and entering the said decree and particularly each portion thereof herein complained of, the Court failed to give full faith and credit to the decree of December 31st, 1886, and its affirmance to which appellant was entitled, under and by

virtue of the following provisions of the Constitution of the United States: Section 8, Article I; Sections 1 and 2 of Article III; Section 1 of Article V and Article VI'' (page 627 Transcript).

Thereafter, in due time, citations were served and the parties entered their appearances in this Court and the Circuit Court of Appeals.

(10) On the 26th day of September, 1908, the Wabash Company filed a motion in the Circuit Court of Appeals to dismiss the appeal pending in that court on the ground that the law does not authorize an appeal from a decree of the Circuit Court entered in exact accordance with the mandate of an appellate court. The Wabash Company has filed a motion to dismiss the appeal pending in this Court and respectfully request the Court to consider this brief in support thereof.

(11) The Colorado Company has presented to this Court a petition for a writ of *certiorari* praying that the Circuit Court of Appeals be required to send up the record of the appeal pending there.

In opposition to the petition for *certiorari* we make the following point and cite the following authorities:

POINTS AND AUTHORITIES.

THE PETITION SHOULD BE DENIED BECAUSE THE DECREE OF DECEMBER 20, 1907, IS A FINALITY AND NOT REVIEWABLE.

Texas & Pacific Ry. Co. v. Anderson, 149 U. S. 237, *l. c.* 241, 242;
Colo. Cent. Cons. Mining Co. v. Truck, 150 U. S. 138, *l. c.* 144;
Mason v. Pewabic Mining Co., 153 U. S., *l. c.* 159;
Rouse v. Letcher, 156 U. S. 47, *l. c.* 49, 50;
Rouse v. Hornby, 161 U. S. 588, *l. c.* 591;
Webster v. Daley, 163 U. S. 155, *l. c.* 159;
Press Publishing Co. v. Monroe, 164 U. S. 105, *l. c.* 112;
Re Jones, 164 U. S. 691, *l. c.* 693–694;
United States v. New York Indiana, 173 U. S. 464, *l. c.* 473;
Carter v. Roberts, 177 U. S. 496, *l. c.* 500;
Loeb v. Columbia Twpt., 179 U. S. 472, *l. c.* 478;
Good Shot v. United States, 179 U. S. 87, *l. c.* 88;
Central Trust Co. v. Grant Locomotive Works, 135 U. S. 227;
Re Washington & G. R. Co., 140 U. S. 91, *l. c.*;
Washington Bridge Co. v. Stewart, 3 How. 413, *l. c.* 424;
Re Sanborn Fork & Tool Co., 160 U. S. 247, *l. c.* 255;
Thompson v. Maxwell Land Grant R. Co., 168 U. S. 451, *l. c.* 456.

ARGUMENT.

We will briefly discuss our point:

THE PETITION SHOULD BE DENIED BECAUSE THE DECREE OF DECEMBER 20, 1907, IS A FINALITY AND NOT REVIEWABLE.

The facts necessary to a determination of the questions involved are admitted in petitioner's brief.

(1) We quote from page 9:

> "After the rendition of the decree (of December 3, 1886) sought to be enforced, and before the filing of the petition (in the present suit) to enforce it, the Circuit Court of Appeals was established, so that in the absence of a constitutional or jurisdictional question, the case had to be appealed to that court (Mason v. Pewabic Mining Co., 153 U. S. 361, 38 L. Ed., 745). This because no constitutional question having been raised, the jurisdiction as to an intervener was to be determined by that of the main cause, which jurisdiction had been invoked because of diverse citizenship (Gregory v. Van, 160 U. S. 643, 40 L. Ed. 566; Cary v. R. Co., 161 U. S. 115, 40 L. Ed. 638; Rouse v. Hornsby, 161 U. S. 583, 40 L. Ed. 817; Pope v. L. & N. R. Co., 173 U. S. 173, 43 L. Ed. 814).

By this language petitioner admits that the jurisdiction of the Circuit Court in the original case, wherein petitioner filed its intervening bill, depended entirely upon diverse citizenship of the parties, and concedes as a matter of law that the jurisdiction of the intervention suit must be ascribed to the same grounds.

(2) We quote from page 10:

> "This, then, being a decree of reversal" (decree of the Circuit Court of Appeals) "was not final, so

that this court would not **then** take jurisdiction by *certiorari*, the controversy being between private parties (C. & N. W. R. Co. v. Osborne, 146 U. S. 354, 36 L. Ed. 1002; Forsythe v. Hammond, 166 U. S. 506–574, 41 L. Ed. 1095, 1098; Taylor v. Louisville, Etc., R. Co., 173 U. S. 648, 43 L. Ed. 1182).

By this language petitioner admits that the controversy involved on the appeal to the Circuit Court of Appeals which was adjudicated by the decree rendered in the Circuit Court December 20th, 1907, was a private one between private parties, and for that reason was not and could not have been properly removed by *certiorari* to this court.

(3) We quote from page 12:

"The Circuit Court entered the decree (Rec. 625, 626) in conformity with the opinion of the Circuit Court of Appeals."

On pages 625 and 626 of the Record will be found the mandate of the Circuit Court of Appeals which remanded the cause to the Circuit Court with directions to enter a decree not inconsistent with the views expressed in the opinion.

(4) We quote from pages 12 and 13:

"Doubtful as to the forum to which the case should be appealed, two appeals were taken, one to the Circuit Court of Appeals, which is now sought to be removed by *certiorari*, and the other directly to this court, where it was filed January 17, 1908, and was regularly docketed as No. 253 at the October, 1908, Term."

By this language petitioner admits that the appeal sought to be removed by *certiorari* to this court was

taken to the Circuit Court of Appeals from the decree of the Circuit Court entered December 20, 1907, in exact conformity with the mandate and that no subsequent proceedings were had in the Circuit Court.

The question is whether that decree is a finality or one that may be reviewed.

The first paragraph of Section 6 of the Judiciary Act of March 3, 1901 (U. S. Comp. Stat. 1901, p. 549), provides that "the judgments or decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit * * * being * * * citizens of different states". The second provides that "it shall be competent for the Supreme Court to acquire by *certiorari* or otherwise any such case to be certified to the Supreme Court for its review and determination * * *."

Under the admitted facts and these provisions of the statute, the decision of the Circuit Court of Appeals embodied in the decree entered in the Circuit Court on December 20th, 1907, is final and therefore concluded the litigation.

> Rouse v. Hornby, 161 U. S. 588, *l. c.* 591;
> Press Pub. Co. v. Monroe, 164 U. S. 105, *l. c.* 112;
> Rouse v. Letcher, 156 U. S. 47, *l. c.* 49–50.

And this is true if we concede that the decree of December 20, 1907, involved the construction and application of a decree entered pursuant to a mandate of this Court (Mason v. Pewabic Mining Co., 153 U. S. 361, *l. c.* 366), or that a constitutional question arose in the course of the proceedings (Colo. Central Consol. Mining Co. v. Turck, 150 U. S. 138, *l. c.* 114; *re* Jones; 164 U. S. 691, *l. c.* 694; Loeb v. Columbia Twp., 179 U. S. 472).

This would also be true with respect to a decree entered pursuant to the mandate of the Circuit Court of Appeals in any case within its jurisdiction (Carter v. Roberts, 177 U. S. 496, *l. c.* 500).

In the latter case this Court said:

> "When cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this court, and if such cases are carried to the Circuit Court of Appeals, those courts may decline to take jurisdiction, or where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance. Holt v. Indiana Manufacturing Company, 46 U. S. App. 717; 176 U. S. 68; United States v. John, 155 U. S. 109; New Orleans v. Benjamin, 153 U. S. 411; Benjamin v. New Orleans, 169 U. S. 161. But when the Circuit Court of Appeals has acted on the whole case its judgment stands unless revised by *certiorari* to or appeal from that court in accordance with the act of March 3, 1891."

What is here said rests upon elementary grounds.

The decrees of the Circuit Court of Appeals, in cases within its jurisdiction, like the decrees of other courts, are conclusive on the parties. The matters which pass into judgment there, are *res adjudicata*. The defeated party cannot, on the coming down of the mandate, renew the litigation by an alleged amendment to the petition, asking the trial court, to reverse the decision of the Circuit Court of Appeals, as attempted in the case at bar.

Tex. & Pac. R. Co. v. Anderson, 149 U. S. 237, *l. c.* 241;

Re Sanborn Fork & Tool Co., 160 U. S. 247, *l. c.* 255;

Thompson v. Maxwell, Land Grant & R. Co., 168 U. S. 451, *l. c.* 456.

The decree, then, being a finality, is not subject to review either in this Court or the Circuit Court of Appeals, and for that reason the orders purporting to allow appeals therefrom are void.

U. S. v. N. Y. Indians, 173 U. S. 464, *l. c.* 473;
Tex. & Pac. Ry. Co. v. Anderson, 149 U. S. 237, *l. c.* 241 & 242;
Carter v. Roberts, 177 U. S. 496, *l. c* 500;
Webster v. Daley, 163 U. S. 155, *l. c.* 159.

Besides, the record petitioner seeks to bring up does not present a question for review. The Circuit Court performed no act except to enter the decree in accordance with the mandate, and that act is the only one complained of in petitioner's assignment of errors (see Statement and p. 627 of Transcript). The propriety of that act is not subject to review, whether it be regarded as the act of the Circuit Court (Washington Bridge Co. v. Stewart, 3 How, 413, *l. c.* 424) or the Circuit Court of Appeals (Webster v. Daley, 136 U. S., 165, *l. c.* 159).

Learned solicitors for petitioner concede that the record sought to be removed does not present to the Circuit Court of Appeals any question for review, but base their case on the assertion that "instead of this being a reason for refusing to grant the writ (of *certiorari*) it is one for granting it" (p. 4 their Brief).

We believe a contention so obviously unsound cannot be supported by anything said in the numerous cases cited by the learned solicitors for petitioner, and for

that reason we will not examine them. (See Good Shot v. United States, 179 U. S. 87, *l. c.* 88.)

We respectfully submit that the petition for writ of *certiorari* should be denied and that the motion to dismiss the appeal pending in this Court should be sustained.

Wells H. Blodgett and
James L. Minnis
Solicitors for Respondent,
Wabash Railroad Company.

without permission from the Circuit Court of Appeals, introduce new questions into the litigation; and the unwarranted introduction of new questions cannot be made the basis of jurisdiction. The mere construction of a decree involves no challenge of its validity.

It is proper for this court to grant certiorari where the questions involve the construction of a prior decree of a United States Circuit Court granting rights of use of railroad tracks and terminal facilities in a great city, and where not only the private interests of the railroad companies and of the shippers, but also the greater interests of the public, require such rights to be settled.

Where a decree gives to another company the equal use and benefit of the right of way of a railroad company in a terminal city on a basis of compensation and apportionment of expenses, with provision for modification in case of unexpected changes, it will be construed as applying to the terminal facilities and the connections with industrial establishments as the same naturally increase in a growing city, and not to the mere right of way as it existed when the decree was entered, and the court has power to provide for the use of such increased facilities on a proportionately increased rental based on the increased valuation.

152 Fed. Rep. 849, modified.

THE facts, which involve the construction of the decree of the Circuit Court in 29 Fed. Rep. 546, as affirmed by this court in the case of *Joy* v. *St. Louis*, 138 U. S. 1, are stated in the opinion.

Mr. Frank Hagerman, with whom *Mr. W. F. Evans* and *Mr. M. A. Low* were on the brief, for appellant in No. 57 and petitioner in No. 301.

Mr. James L. Minnis, with whom *Mr. Wells H. Blodgett* was on the brief for appellee in No. 57 and respondent in No. 301.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court, after reading the following memorandum:

This opinion was prepared by our Brother BREWER, and had been approved before his lamented death. It was then recirculated and is adopted as the opinion of the court.

On January 6, 1886, there was entered in the Circuit Court

of the United States for the Eastern District of Missouri a decree of foreclosure and sale of the Wabash, St. Louis and Pacific Railway Company, hereinafter called the Wabash Company. In that suit, before the execution of the deeds to the purchasing committee, a railway corporation known as the St. Louis, Kansas City and Colorado Railroad Company (hereinafter called the Colorado Company) and the city of St. Louis intervened to compel the Wabash Company to give to the Colorado Company the use of its tracks and a right of entrance over them to the Union Depot of that city. On that intervention a decree was entered finding the equities in favor of the intervenors, and granting the Colorado Company the use of the tracks and right of way. 29 Fed. Rep. 546. On appeal to this court the decree of the Circuit Court on the intervention was, on January 19, 1891, sustained. *Joy* v. *St. Louis*, 138 U. S. 1.

A dispute having arisen as to the rights granted by that decree, a petition was filed at the March term, 1902, of the Circuit Court in the original foreclosure case to enforce those rights as the Colorado Company claimed they existed. A large amount of testimony was taken upon this application, and a decree entered April 2, 1906. Thereupon an appeal was taken to the Circuit Court of Appeals for the Eighth Circuit, which, on April 3, 1907, reversed the decree and remanded the case "with directions to enter a decree not inconsistent with the views" expressed in the opinion of the court. 81 C. C. A. 643. The case went back to the Circuit Court, and after an amendment to the petition, which was allowed by the court, a decree was entered in obedience to the mandate, from which decree an appeal was again taken to the Circuit Court of Appeals, and also to this court. On the appeal to the Circuit Court of Appeals the record was filed in that court, and thereupon an application for a certiorari was made to this court, so that two cases are before us with records precisely alike, one the appeal from the Circuit Court directly to this court (being case No. 57) and the other the petition for a certiorari to the

Court of Appeals (being case No. 301). [This petition was filed and presented to the court November 30, 1908, and on December 7, 1908, consideration of the petition was postponed to be heard with No. 57.]

The Wabash Company has filed a motion to dismiss No. 57, the case appealed directly to this court. The jurisdiction of the original foreclosure suit was based solely upon diverse citizenship, and it has been repeatedly decided that the jurisdiction in the case of an intervention is determined by that of the main cause. *Rouse* v. *Letcher*, 156 U. S. 47; *Gregory* v. *Van Ee*, 160 U. S. 643; *Carey* v. *Railway Company*, 161 U. S. 115; *Rouse* v. *Hornsby*, 161 U. S. 588; *Pope* v. *Railway Company*, 173 U. S. 573.

If this be true in respect to an intervention, *a fortiori* must it be true in respect to a petition to enforce rights granted by the decree in the intervention. Nor is this rule changed by the fact that when this case went back from the Circuit Court of Appeals to the Circuit Court the latter court authorized an amendment to the petition, alleging that the decree ordered by the Court of Appeals failed to give full faith and credit to the original decree in the intervention proceedings, for, as said in *Pope* v. *Railway Company, supra* (p. 578):

"And this is true although another ground of jurisdiction might be developed in the course of the proceedings, as it must appear at the outset that the suit is one of that character of which the Circuit Court could properly take cognizance at the time its jurisdiction is invoked. *Colorado Central Mining Company* v. *Turck*, 150 U. S. 138; *In re Jones*, 164 U. S. 691, 693; *Third St. and Suburban Railway Company* v. *Lewis, ante*, 456."

Further, the power of the Circuit Court was limited to the entry of a decree as ordered by the Court of Appeals, and it could not introduce new questions into the litigation without the permission of that court. *Ex parte Dubuque & Pacific Railroad*, 1 Wall. 69; *In re Sanford Fork & Tool Company*, 160 U. S. 247. Still further, the mere construction of a decree in-

volves no challenge of its validity. *Smithsonian Institution* v. *St. John*, 214 U. S. 19, 29, and cases cited in the opinion.

The motion to dismiss No. 57 must, therefore, be sustained with costs.

With reference to the application for a certiorari, the power of this court cannot be doubted. As said in *Forsyth* v. *Hammond*, 166 U. S. 506, 514.

"We reaffirm in this case the propositions heretofore announced, to wit, that the power of this court in certiorari extends to every case pending in the Circuit Courts of Appeal, and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute would be finally determined in that court."

On the appeal to the Circuit Court of Appeals the case was there pending for consideration and decree, and, as for reasons heretofore stated, an appeal to this court would not lie, the case can be brought here by certiorari.

The question then is whether the writ of certiorari ought to be granted. That question involves the construction of a prior decree of a United States Circuit Court, affirmed by this court. It is not a question of the payment of money, but of the extent of the use belonging to one railroad company in the tracks, right of way and terminal facilities of another, as well as the rights of access by the one company to industries established along the line of the other. This, in view of the increasing number of industries in a great and growing city like St. Louis, is of constantly enlarging importance, and ought, so far as possible, to be settled. It seems to us that both the private interests of the railroad companies, and of the separate industries and the greater interests of the public call for the granting of the writ of certiorari, and it is, therefore, so ordered.

This brings before us the original decree on the intervention. That decree, and the facts upon which the original controversy arose, as well as those upon which the present dispute rests, will be found fully stated in 29 Fed. Rep. 546; *Joy* v. *St. Louis*,

138 U. S. 1, and 81 C. C. A. 643, *supra*, and need not be repeated. It is sufficient to say that the decree was founded upon contracts to which the railroad companies, or their predecessors, were parties, by which the Wabash Company agreed to "permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park, and up to the terminus of its road in the city of St. Louis, upon such terms, and for such fair and equitable compensation, to be paid to it therefor, as may be agreed upon by such companies." It provided that the Colorado Company should pay $2,500 a month "for the use of the right of way, and tracks, side tracks, switches, turnouts, turntables and other terminal facilities of the said Wabash, St. Louis and Pacific Railway at and between the north line of Forest Park and Eighteenth street in the city of St. Louis," and that of these properties it should "enjoy the equal use and benefit." It apportioned the expense of maintaining on a wheelage basis this right of way and other property during such joint use.

Two principal questions are presented, each having reference to the existence of the rights granted by the intervention decree. The eastern line of Forest Park is about three miles west of Eighteenth street, and at the time the decree was entered the Wabash Company owned a strip of land varying in width from twenty-eight to over two hundred feet and extending from Eighteenth street to the east line of the park, and also had an easement for the passage of its trains and engines through the park upon a strip of land forty-two feet wide from the east to the north side thereof. The ground owned by the Wabash is not, as stated, of equal width, portions having been obtained by deeds from different owners, some being only twenty-eight feet in width and others extending quite a distance, so as to furnish room for roundhouses and other terminal facilities. Now, it is contended that the only effect of this decree was to give to the Colorado Company the right to use the two continuous tracks from the north line of Forest

Park into the Union station, while, on the other hand, it is contended that it gave to the Colorado Company the equal use and benefit of the entire ground owned by the Wabash and used for its terminal facilities. Both the Circuit Court and the Circuit Court of Appeals sustained the latter construction, and with that conclusion we concur. The terminal facilities, and not simply a right of way over the tracks of the Wabash running to the Union station, were granted by the decree. As said by Circuit Judge Sanborn, delivering the opinion of the Court of Appeals (p. 646):

"The ordinary signification of the term 'right of way,' when used to describe land which a railroad corporation owns or is entitled to use for railroad purposes, is the entire strip or tract it owns or is entitled to use for this purpose, and not any specific or limited part thereof upon which its main track or other specified improvements are located. *Joy* v. *St. Louis*, 138 U. S. 1, 44, 45, 46; *Territory of New Mexico* v. *United States Trust Co.*, 172 U. S. 171, 181–2; 174 U. S. 545, 546; *Chicago & Alton R. Co.* v. *People*, 98 Illinois, 350, 356–7; *Lake Erie & W. R. Co.* v. *Middlecoff*, 150 Illinois, 27, 37 N. E. Rep. 660, 663; *Pfaff* v. *Terre Haute & I. R. Co.*, 108 Indiana, 144, 148, 9 N. E. Rep. 93, 95.

"To one ignorant of the origin and history of the rights of the contending parties and unaware of the persuasive arguments of counsel the reading of this decree would suggest no doubt that it granted the joint use of the entire strip owned by the Wabash Company and of all the railroad facilities thereon between the east line of the park and Eighteenth street. Upon its face there is no ambiguity in its terms. They suggest no limitation or exception, and when the terms of a decree are plain and clear their ordinary meaning and effect may not be lawfully contracted or extended unless it appears with reasonable certainty that such was the purpose of the court; for the legal presumption is that the judge carefully and thoughtfully expressed therein his deliberate intention. The Wabash Company, therefore, assumed no light burden when it essayed to

prove that the court intended by this decree to grant to the Colorado Company the joint use of a strip only thirty feet in width out of the wider strip the Wabash Company owned between the east line of the park and Eighteenth street."

The other matter involves the question of the right of access to industrial establishments which have been built up near to the line of the Wabash road. As might be expected in a growing city like St. Louis, there are now many such establishments, access to which has been obtained by the construction of tracks connecting them with the main tracks of the railway. The use of these connecting tracks, which were constructed under different arrangements with the various establishments, is claimed by the intervenor, thus making itself a close and active competitor with the Wabash Company for their transportation business.

The general conclusion of the Court of Appeals is stated in these words (p. 657):

"The conclusion is that the Colorado Company is entitled to enjoy the joint and equal use of the entire strip of land between the east line of the park and Eighteenth street, which the Wabash owned or had acquired the right to use when the decree of 1886 was rendered, and of the tracks, side tracks, turnouts, turntables and terminal facilities now thereon. But it is not entitled to the use under that decree of any of the property, industrial or railway facilities of the Wabash Company beyond the limits of that strip. *Union Pacific R. Co.* v. *Mason City & Fort Dodge R. Co.*, 199 U. S. 171."

From the latter part of this conclusion Circuit Judge Hook dissented, and that presents the question now to be considered. We are of opinion that the Circuit Court of Appeals erred, and that the views of Judge Hook are correct. That the matter was considered by the Circuit Court at the time of the original decree is evident from the opinion of the Circuit Judge, in which it was said (29 Fed. Rep. 559):

"The final matter is that of compensation. In this I think

the master erred. He fixed the value of the right of way at a million of dollars; and reported that, in his judgment, the share of the interest on this value and in the expenses of keeping up the track, which the intervenor company should pay, should be fixed upon a wheelage basis. So far as respects the mere matter of keeping up the track, I see no reason to doubt the justice of the rule fixed by the master; but in regard to the interest on the value, I think the intervenor should pay one-half of that, and for these reasons: It is a familiar fact that in a large city like St. Louis, along the track of an important railroad, within the city limits, are built large manufacturing establishments, warehouses and other buildings for the convenient transaction of business between the carrier on the one hand and the manufacturer and the merchant on the other. Another road coming over the same track not only uses the property, of great value, which the company owner has in the first instance paid for, but also shares in the benefit of access to all these manufactories, warehouses, etc. It thus places itself in competition with the original company for this valuable business. Such competition may operate to diminish the business of the original company, or compel it to lower its rates to preserve the business. In either way it operates to the serious detriment of the original company. The new company comes in as an equal competitor. It shares in all the benefits of this business, and it may share equally. Under those circumstances it seems to me no more than fair that a new company, which crowds itself into an equal access to such benefits and such privileges, should pay an equal share of the interest on the value of the property. Hence I shall sustain the objections of the respondent to the report of the master, so far as concerns the amount of compensation, and I think that the intervenor company must pay one-half the interest on the value and its share of the cost of keeping up the track, determined upon a wheelage basis. In other respects the report of the master will be confirmed."

ST. LOUIS, KANSAS CITY AND COLORADO RAILROAD COMPANY *v.* WABASH RAILROAD COMPANY AND CITY OF ST. LOUIS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

SAME *v.* SAME.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Nos. 57, 301. Argued December 9, 1909.—Decided April 11, 1910.

Jurisdiction in case of an intervention is determined by that of the main case, and where the original foreclosure case was based solely upon diverse citizenship an appeal from the judgment of the Circuit Court of Appeals on a petition to enforce rights granted by a decree in an intervention in such foreclosure suit does not lie to this court.

Where the Circuit Court of Appeals remands a suit to the Circuit Court with instructions to enter a decree, the Circuit Court cannot,

That is an interpretation of the language of the intervention decree giving the use of the right of way, side tracks, switches, turnouts, turntables and other terminal facilities. It is doubtless true that a connection with these industrial establishments has become a matter of far greater importance than at the time of the decree. If it be said that this has cast an unexpected burden upon the Wabash, it must also be remembered that provision was made for such unexpected changes. As said in the opinion (p. 558):

"An act of the legislature might be passed giving to one company the right to use the tracks of another, and prescribing all the terms and conditions—the details for the use. I take it, an act of the legislature would also be valid which simply declared that one company should have the right to use the tracks of another upon such terms and conditions as the parties might agree upon, or should be prescribed by the courts, and if such a legislative act would have to be adjudged valid and complete, I see no satisfactory reason why courts may not also hold sufficient and valid a mere contract for the right, and, determining the right, also settle and prescribe the terms of the use. It is true that such a decree cannot be executed by the performance of a single act. It is continuous in its operation. It requires the constant exercise of judgment and skill by the officers of the corporation defendant; and therefore, in a qualified sense, it may be true that the case never is ended, but remains a permanent case in the court, performance of whose decree may be the subject of repeated inquiry by proceedings in the nature of contempt. It is also true that in the changing conditions of business the details of the use may require change. The time may come when the respondent's business may demand the entire use of its tracks, and the intervenor's right wholly cease. But other decrees are subject to modification and change, as in decrees for alimony. The courts are not infrequently called upon to modify them by reason of the changed condition of the parties thereto. So, when a decree passes in a case of this kind, it

remains as a permanent determination of the respective rights of the parties, subject only to the further right of either party to apply for a modification upon any changed condition of affairs; and, so far as any matter of supervision of the personal skill and judgment of the officers of the respondent corporation, the contract, in terms, provides that the regulation of the running of trains shall be subject to the control of the officers of the respondent."

See also the opinion of this court in 138 U. S. 1, 47.

The decree of the Circuit Court of December 20, 1907, is therefore modified in accordance with the views we have expressed as to terminal facilities in connection with the industrial establishments now existing near the right of way of the Wabash Company. If that company shall desire it may apply for a valuation of the additional properties of which the equal use and enjoyment is given to the intervenor, and upon that valuation the same per cent shall be paid by the intervenor. The costs, except so far as they have been already taxed, shall be charged against the respondents.